Blue to Gold
LAW ENFORCEMENT TRAINING

CASE LAW

Plain View & Plain Feel

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783 So.2d 86
Supreme Court of Alabama.

Ex parte George Ester WARREN, Jr.
(In re George Ester Warren, Jr.
v.
State.)

1980792.
|
Sept. 8, 2000.

Synopsis

Defendant was convicted in the Lee Circuit Court, No. CC-96-1365, James T. Gullage, J., of unlawful possession of cocaine. He appealed, and the Court of Criminal Appeals, Long, P.J., 783 So.2d 74, affirmed. On grant of certiorari review, the Supreme Court, Lyons, J., held that seizure of container detected during patdown search was not justified under plain-feel doctrine.

Reversed and remanded.

Johnstone, J., filed a specially concurring opinion.

See, J., concurred in result and filed an opinion.

Hooper, C.J., and Maddox, J., filed dissenting opinions.

On remand to, Ala.Cr.App., 783 So.2d 99.

Attorneys and Law Firms

***87** Margaret Y. Brown, Auburn, for petitioner.

Bill Pryor, atty. gen., and Beth Slate Poe, asst. atty. gen., for respondent.

Opinion

LYONS, Justice.

A jury convicted George Ester Warren, Jr., of possession of cocaine, in violation of § 13A–12–212, Ala.Code 1975. The trial court sentenced Warren to eight years' imprisonment. Warren appealed to the Court of Criminal Appeals. On appeal, he argued that the cocaine, which had been contained in a small plastic container in his pants pocket, was seized in violation of his rights guaranteed by the Fourth Amendment to the United States Constitution and, therefore, that the trial court erred in denying his motion to suppress the cocaine evidence. The Court of Criminal Appeals affirmed. *Warren v. State,* 783 So.2d 74 (Ala.Crim.App.1998). This Court granted certiorari review to determine whether the Court of Criminal Appeals erred in holding that the trial court had properly denied Warren's motion to suppress. We reverse and remand.

John Toney, a captain in the narcotics division of the Opelika Police Department, testified that on the afternoon of August 14, 1996, he received a telephone call from a confidential informant. Toney stated that he not only recognized the informant's voice, but also recognized the telephone number that was shown on a screen at his telephone. He said he had talked with the informant approximately seven or eight times in the previous six to eight weeks. On this occasion, the informant gave Toney his name. Toney testified that none of the information received previously from the informant had led to arrests, but that the informant had always offered reliable information.

The informant told him, he said, that the informant was watching a group of black males standing around a white car, and that the men were buying and selling drugs. The informant provided a street address, a description of the car, and a partial license plate number of the car (all digits except the last). The informant did not, however, give any physical description of the men standing around the car, except to say that there were approximately four or five of them, that they were black, and that they looked like the "usual drug dealers."

***88** Within five minutes, Toney relayed the information to Detective Greg Wilson, a plainclothes detective in the narcotics division. Toney instructed Wilson to proceed to the scene to investigate. Wilson, accompanied by two other detectives, drove to the scene in an unmarked police car. Wilson testified that when he got to the address given by the informant, he saw several black males standing around a white car that matched the description and that had a license plate with a number that matched the partial tag number given by the informant. Wilson radioed for assistance, he said, and then he and the other two detectives got out of their car and approached the men standing around the white car. Wilson said that he and the other detectives identified themselves as police officers and began "field interviews" of the men, which consisted of asking their names and asking to see their identification. Warren was one of the men standing around the car, and he cooperated with the officers' requests. At

that point, an additional police officer arrived in response to Wilson's request for assistance. The officers then decided to pat the men down for weapons. Wilson testified that the purpose of the patdown was "[t]o look for weapons or anything that could be used to harm one of the officers or detectives that were there at the scene," and that to conduct a patdown was standard procedure in this kind of situation.

Warren contends that he was patted down by one officer, who, he says, found no weapons on his person; then, he says, Wilson proceeded to pat him down for weapons a second time. Both Wilson and Officer Gary Jernigan testified, however, that Jernigan began the patdown of Warren, that Wilson joined him, and that together they completed the patdown of Warren. Wilson testified that during the patdown, he felt what he described as a "plastic box" in Warren's front pants pocket, and, he said, he removed it. When asked why he did so, Wilson replied:

> "Through my experience as being an investigator in narcotics, I believed that it did, in fact, contain drugs because I have ran across the same type plastic containers in the past that have came off defendants that did, in fact, hold cocaine."

The "plastic box" was, in fact, a container ordinarily used to hold breath mints known as "Tic Tacs." The Tic Tac box in Warren's pocket, however, contained several small rocks that Wilson said appeared to be crack cocaine. The forensics report confirmed that the small rocks were crack cocaine.

Although Wilson testified that he and his fellow officers conducted the patdowns for safety reasons to search for weapons, he said that he reached into Warren's pocket to retrieve the Tic Tac box not because he thought it was a weapon, but because he thought it contained drugs:

> "Q.... Did you ever feel anything that you felt was a weapon?
>
> "A. No, I did not.
>
> "Q. Okay. Why if you didn't feel anything that you thought was a weapon did you go into Mr. Warren's pockets?
>
> "A. Like I explained earlier, as my experience as a narcotics investigator, being in an area where drugs are sold and acting on the information that we had received, Mr. Warren being in front of the car, I determined through my experience that it could possibly contain—contain drugs and narcotics, and that's why it was removed from his pocket."

Wilson also testified that in his best judgment, during approximately 50 patdowns he had conducted during his 16 months as a narcotics officer, he had felt and removed similar plastic containers four or five times during similar searches. In response ***89** to a question by Warren's attorney, he said that he had not found candy in any of the boxes, but he never said how many of the boxes he had felt and removed had contained illegal narcotics.

Warren argues, as he did before the Court of Criminal Appeals, that the police officers who searched and arrested him had received information from an unreliable informant and, therefore, lacked the reasonable suspicion required under *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), to justify the initial investigative stop; and that Wilson exceeded the scope of a permissible *Terry* search when he retrieved the Tic Tac box from Warren's pocket during the patdown. The Court of Criminal Appeals held (1) that "the facts of this case created a reasonable suspicion that justified the investigatory stop of Warren, based on the information received from the informant and the independent police verification of [that] information" (783 So.2d at 79–80); (2) that "it was reasonably prudent for Detective Wilson to initiate the protective patdown of Warren" (783 So.2d at 81); (3) that "Detective Wilson's intrusion into Warren's pocket to retrieve the container fell outside the purpose of the protective patdown authorized by *Terry*" (783 So.2d at 82); and (4) that Wilson's seizure of the Tic Tac box was nevertheless justified on a different basis, i.e., the "plain-feel doctrine" announced by the United States Supreme Court in *Minnesota v. Dickerson,* 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993). We agree with the Court of Criminal Appeals as to these first three holdings, and we see no need for any further discussion here of the issues to which those holdings related. We cannot agree, however, that Wilson's seizure of the Tic Tac box was justified by the plain-feel doctrine.

In *Dickerson,* the Supreme Court held that if a police officer detects contraband during a valid *Terry* patdown search, the officer may seize the contraband and it may be admitted into evidence. In stating the plain-feel doctrine, the Court rejected the contention that "plain feel" is not comparable to "plain view":

> "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.
>
> "... The very premise of *Terry,* after all, is that officers will be able to detect the presence of weapons through the sense of touch and *Terry* upheld precisely such a seizure. Even if it were true that the sense of touch is generally less reliable than the sense of sight, that only suggests that officers will less often be able to justify seizures of unseen contraband. Regardless 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."

508 U.S. at 375–76, 113 S.Ct. 2130 (footnotes omitted). The Court of Criminal Appeals has adopted the plain-feel doctrine in Alabama. See *Huffman v. State,* 651 So.2d 78 (Ala.Crim.App.1994) (holding that an officer had not exceeded the scope of *Terry* when, during a patdown, he recognized without any further examination that he felt a lump that had the configuration of a crack-cocaine rock); and *Allen v. State,* 689 So.2d 212 (Ala.Crim.App.1995) (holding ***90** that an officer had not exceeded the scope of *Terry* when he retrieved an envelope of marijuana that he simultaneously realized was not a weapon but recognized as an envelope containing marijuana).[1]

Dickerson establishes three prerequisites for a police officer's seizure of contraband pursuant to the plain-feel doctrine:

1. The officer must have a valid reason for the search, i.e., the patdown search must be permissible under *Terry.*

2. The officer must detect the contraband while the *Terry* search for weapons legitimately and reasonably is in progress.

3. The incriminating nature of the object detected by the officer's touch must be *immediately apparent* to the officer so that before seizing it the officer has probable cause to believe the object is contraband.

The first two prerequisites are met in this case. The Court of Criminal Appeals concluded, and we agree, that Wilson was conducting a permissible *Terry* search that legitimately and reasonably was still in progress when he detected the Tic Tac box in Warren's pocket. The difficulty in this case is deciding whether it is possible for a Tic Tac box to have an incriminating nature such that it was "immediately apparent" to Wilson that he had probable cause to believe before he seized it that the Tic Tac box contained contraband. The Court of Criminal Appeals concluded that Wilson had the necessary probable cause:

> "We conclude that, upon patting the outer surface of Warren's pants pocket and immediately recognizing the object therein to be a plastic container, Detective Wilson had, under the totality of [the] circumstances, probable cause to believe that the plastic container contained illegal narcotics. The following facts support our conclusion: (1) Captain Toney received information from a known informant that four or five black males were standing around a car that was parked in front of a specific address and were selling narcotics from the car; (2) the informant had provided Captain Toney with reliable information in the past concerning persons apparently involved in illegal drug transactions; (3) the basis of the informant's knowledge in the present case was firsthand, as the events the informant related to Captain Toney over the telephone were being observed by the informant as the telephone call was being made; (4) although the informant did not know the men involved in the apparent drug activity, his description of the men and the car they were standing around contained ample detail-down to a partial license plate number for the car; (5) Captain Toney relayed the contents of the informant's ***91** tip to Detective Wilson, who arrived at the location designated by the informant within minutes of the informant's telephone call; (6) Detective Wilson's own observations upon arriving at the designated location verified many of the details supplied by the informant, including the number of suspects involved in the alleged drug activity, the race of those suspects, the fact that they were gathered around a car of a particular make, year, and color, and the car's partial license plate number; (7) while conducting an authorized protective patdown of Warren, who was among the group of men standing around the car, Detective Wilson encountered an object in Warren's pants pocket that he immediately recognized as a plastic container; (8) Detective Wilson was aware, based on his experience as a narcotics investigator, that illegal narcotics, in particular cocaine, are often carried in the type container that he felt on Warren's person; and (9) Detective Wilson provided ample testimony concerning his experience in narcotics cases and the basis for connecting the plastic container with the possession of cocaine.
>
> "We note that in *People v. Champion,* 452 Mich. 92, 549 N.W.2d 849 (1996), *cert. denied,* 519 U.S. 1081, 117 S.Ct. 747, 136 L.Ed.2d 685 (1997), the Michigan Supreme Court reached the same conclusion based upon facts similar to

those in this case. In *Champion,* the Court held that the following facts provided the officer with probable cause to seize a pill bottle that he felt, between the defendant's leg and groin area, through the defendant's clothing while conducting a protective patdown: (1) the officer, who was patrolling a high drug-crime area, observed the defendant get out of a car and walk away upon seeing a patrol car and uniformed police officers; (2) the officer recognized the defendant and knew of his previous convictions for drug and weapons offenses; (3) the defendant had his hands tucked inside the front of his sweatpants and refused to take his hands out of his sweatpants despite being repeatedly asked to do so by the officer; and (4) the officer testified that he had considerable experience in drug cases and was aware that controlled substances are frequently carried in pill bottles like those he felt while patting down the defendant."

783 So.2d at 85.

Many of our sister states have also wrestled with the problem we address here. Can an officer's tactile perception of an object such as a Tic Tac box, a matchbox, a pill bottle, or a film canister give the officer probable cause to believe, before seizing it, that the object is contraband? As the Supreme Court of Pennsylvania stated, "[O]fficers experienced in drug enforcement have, more likely than not, seen drugs packaged in all kinds of material, ranging from cardboard to [Tic–Tac] containers to pill bottles to film canisters." *Commonwealth v. Stevenson,* 560 Pa. 345, 358, 744 A.2d 1261, 1268 (2000).[2] The Pennsylvania court, in holding that an officer's seizure of folded cardboard from a suspect's pocket was not made valid under ***92** the plain-feel doctrine, observed that "[t]he mere fact that an officer has seen others use an object to package drugs ... does not mean that once the officer feels that object during a patdown search of a different individual, he automatically acquires probable cause to seize the object under the plain-feel doctrine as something that is 'immediately apparent' as contraband." *Id.*

The Supreme Court of Tennessee made a similar observation in *State v. Bridges,* 963 S.W.2d 487 (Tenn.1997):[3]

"[A] majority of this Court has determined that Officer Blackwell did not have probable cause to believe that the [pill bottle] he felt was contraband, and that he did not have probable cause to believe that the bottle contained contraband. In an affidavit filed as an exhibit to the suppression hearing Officer Blackwell described the patdown of the defendant as follows:

" 'For my protection I immediately identified myself and frisked Bridges for weapons. When I touched his right jacket pocket I immediately recognized a pill bottle, in that pocket, that is used by the majority of crack dealers to hold their crack cocaine.... The pill bottle contained crack cocaine. I charged him and also found a small bag of crack cocaine in the same pocket.'

"....

"*While Officer Blackwell said that he 'immediately recognized' the item as a pill bottle, unless he was clairvoyant, he could not have discerned the contents from merely touching the container.* Such a bottle, or one resembling it by touch, may enclose legal medication, candy, pins, film or any number of other small items. Officer Blackwell's testimony does not specify the objective basis upon which he relied for identification of the container itself or its possible contents as contraband. The record contains little evidence of Officer Blackwell's experience in drug cases and no evidence as to how he connected the container with the possession of cocaine....

"Under the proof in this record, it is evident that it was not ... apparent to Officer Blackwell that the bottle contained contraband until it was removed from the defendant's pocket. This, however, is the very type of further manipulation forbidden by *Dickerson.*"

963 S.W.2d at 495 (citations omitted) (emphasis added).

Federal courts also have studied this problem. In *United States v. Ross,* 827 F.Supp. 711 (S.D.Ala.1993), *aff'd,* 19 F.3d 1446 (11th Cir.1994) (table),[4] the court held ***93** that an officer's discovery of a matchbox in the defendant's underwear during a patdown search did not justify the removal of the box and the seizure of cocaine in it. The court said:

"[A]s the court reads *Dickerson,* the seizure of cocaine in this case would have been justified *only* if, upon touching the material tucked inside Ross's underwear, the incriminating character of the material as illegal contraband was 'immediately apparent.' Even if *Dickerson* were to permit a court to interpret 'suspicions' as being tantamount to 'knowledge,' the case would *not* admit of such construction in this case. That is so because of what

> Dinkins felt and suspected upon patting down Ross's pelvic area: *Dinkins believed the item in Ross's underwear to be a box—he did not believe, sense, or suspect the box to be contraband, although he suspected that the box might contain illegal contraband.* The only way that Dinkins could have verified his suspicions concerning the contents of the box was if he removed the box and looked inside. Neither *Dickerson* nor *Terry* [allows] such action. However reasoned and informed Dinkins's suspicions were in this case, they plainly were insufficient to allow the seizure of cocaine from Ross."
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> 827 F.Supp. at 719 (footnotes omitted) (portions of third emphasis added).

There is a split of authority among the courts that have reviewed the seizure of a container such as a Tic Tac box, a matchbox, a pill bottle, or a film canister that, after being removed from the person of the suspect and examined, was found to contain contraband. A significant number of courts have held that such a seizure does not comply with the requirements of the plain-feel doctrine. See *United States v. Gibson,* 19 F.3d 1449 (D.C.Cir.1994) ("flat hard object" containing cocaine was seized because it did not correspond with anything officer expected to find in pants pocket; seizure held improper); *United States v. Mitchell,* 832 F.Supp. 1073 (N.D.Miss.1993) (court could not accept officers' testimony that contraband was "immediately apparent" upon officers' patting defendant's outer clothing; the six small plastic bags of crack cocaine had been placed in a white athletic sock that was in a brown paper sack in defendant's pocket); *State v. Brown,* 773 So.2d 742 (La.App.2000) (no weapon or contraband "immediately apparent" when officers removed brown paper bag from defendant's pocket); *Commonwealth v. Guillespie,* 2000 Pa.Super. 16, 745 A.2d 654 (2000) (seizure of pill bottle from defendant's pocket was unlawful because bottle was not in a suspicious location on defendant's person and did not reveal an incriminating consistency through officer's tactile sense); *State v. Myers,* 756 So.2d 343 (La.App.1999) (officer's intrusion into defendant's pocket to search for what he thought was a matchbox containing cocaine did not comply with plain-feel doctrine); *State v. Abrams,* 322 S.C. 286, 471 S.E.2d 716 (1996) (evidence obtained by seizure of Tylenol bottle suppressed because incriminating character of the object was not immediately apparent during patdown); *State v. Parker,* 622 So.2d 791 (La.App.), *cert. denied,* 627 So.2d 660 (La.1993) (officer had no justification to seize matchbox from defendant's pocket and open it to search for drugs, because identity of contraband was not readily identifiable); *Campbell v. State,* 864 S.W.2d 223 (Tex.App.—Waco 1993) (seizure, from front pocket, of film canister containing cocaine held improper). But see *State v. Lee,* 126 Ohio App.3d 147, 709 N.E.2d 1217, *discretionary appeal not allowed,* 82 Ohio St.3d 1412, 694 N.E.2d 75 (1998) (trial court erroneously concluded that officer felt only container and not ***94** contraband when officer had stopped defendant in high crime area at 1:00 A.M., defendant walked away as he put something in his pocket, defendant grabbed at officer's hand during patdown, pill bottle rattled when patted, and officer said he knew pill bottles were commonly used to carry illegal drugs); *State v. Rushing,* 935 S.W.2d 30 (Mo.1996), *cert. denied,* 520 U.S. 1220, 117 S.Ct. 1713, 137 L.Ed.2d 837 (1997) (seizure of cylindrical medicine bottle from defendant's pocket upheld; suspicious transaction had been observed, neighborhood had reputation as drug-trafficking area, and officer had knowledge about, and experience with, commonly used drug containers); *Champion,* 452 Mich. at 110–12, 549 N.W.2d at 858–59 (seizure of pill bottle upheld—officer with 20 years' experience in narcotics work searched defendant known to him; defendant was stopped in high-crime area; and officer discovered pill bottle in defendant's groin area[5]). Compare cases in which the officer could feel the contraband itself or could feel the contraband through packaging, e.g., *United States v. Craft,* 30 F.3d 1044 (8th Cir.1994) (seizure of hard, compact packages of heroin taped around defendant's ankles upheld); *United States v. Hughes,* 15 F.3d 798 (8th Cir.1994) (seizure of "small lumps" believed to be crack cocaine upheld); *State v. Trine,* 236 Conn. 216, 673 A.2d 1098 (1996) (officer who testified as to his experience with narcotics felt rock of cocaine in pocket); *Andrews v. State,* 221 Ga.App. 492, 471 S.E.2d 567 (1996) (officer with seven years' experience who had made thousands of arrests immediately knew object he felt was cookie of crack cocaine); *People v. Mitchell,* 165 Ill.2d 211, 209 Ill.Dec. 41, 650 N.E.2d 1014 (1995) (seizure of piece of cocaine rock inside plastic "baggie" upheld); *Commonwealth v. Dorsey,* 439 Pa.Super. 494, 654 A.2d 1086 (1995) (seizure of lump in plastic bag upheld); *State v. Wilson,* 112 N.C.App. 777, 437 S.E.2d 387 (1993) (seizure of lumps in package in breast pocket upheld because the nature of the contraband was apparent); *State v. Buchanan,* 178 Wis.2d 441, 504 N.W.2d 400 (1993) (seizure from waistband of plastic bag containing cocaine upheld).

After considering both lines of cases that have reviewed the difficult issue presented in this case, we conclude that the better-reasoned view is that espoused by those courts holding that if the object detected by the officer's touch during a *Terry* search is a hard-shell, closed *container,* then the incriminating nature of any *contents* of that container cannot be immediately apparent to the officer until he seizes it and

opens it. In such a situation, the officer cannot satisfy the *Dickerson* requirement that the officer have probable cause to believe, before seizing it, that the *object* is contraband. Although the plain-feel doctrine has a field of operation under circumstances such as those discussed by the Court of Criminal Appeals ***95** in *Allen* and *Huffman,* supra, in which the nature of the contraband itself was immediately apparent to the officer, the plain-feel doctrine does not justify Wilson's seizure of the Tic Tac box from Warren's pocket in this case.[6] The Court of Criminal Appeals erred in affirming the trial court's denial of Warren's motion to suppress.

The judgment of the Court of Criminal Appeals is reversed, and the cause is remanded for an order or further proceedings consistent with this opinion.

REVERSED AND REMANDED.

HOUSTON, COOK, and ENGLAND, JJ., concur.

JOHNSTONE, J., concurs specially.

SEE, J., concurs in the result.

HOOPER, C.J., and MADDOX, J., dissent.

BROWN, J., recuses herself.[*]

JOHNSTONE, Justice (concurring specially).

I concur in the scholarly majority opinion in all respects except its supportive references to *Huffman v. State,* 651 So.2d 78 (Ala.Crim.App.1994), and *Allen v. State,* 689 So.2d 212 (Ala.Crim.App.1995). *Huffman* violates the binding precedent of *Minnesota v. Dickerson,* 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993), but rationalizes the violation by making an illusory factual distinction. *Allen,* in turn, is a prime example of the abuses that can result from *Huffman.* Both cases encourage unconstitutional intrusions and disingenuous testimony by police officers.

The majority opinion is commendable in that it obeys the paramount law proclaimed by the Fourth Amendment to the United States Constitution and Article 1, § 5, of the Constitution of Alabama of 1901, respectively, as follows:

> "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."

Amendment IV, Constitution of the United States.

> "That the people shall be secure in their persons, houses, papers, and possessions from unreasonable seizure or searches, and that no warrants shall issue to search any place or to seize any person or thing without probable cause, supported by oath or affirmation.

Article I, § 5, Constitution of Alabama of 1901. This paramount law prohibits a law-enforcement officer from searching a private citizen without probable cause. Any modern law-enforcement officer is perfectly able in both intellect and training to follow this law. A law-enforcement officer may encounter frustration only if he undertakes to abuse *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and *Minnesota v. Dickerson,* 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993), by extending what should be a minimally intrusive patdown for weapons that might ***96** pose an immediate danger to an officer asking a few noncustodial questions, into a full, intimate, body-feeling search for whatever might advance the officer's investigation. A *Terry* patdown (by definition, without probable cause at the outset) cannot constitutionally include the groping, feeling, intrusion, and inspection permissible in searches with probable cause or searches of prisoners, including those just arrested.

Allowing searches beyond constitutional limits would solve or detect some more crimes, as a number of authoritarian governments around the world have proved. Allowing searches beyond constitutional limits, however, would convert the authorities themselves from the solution into the problem, as the same authoritarian governments have likewise proved.

The founders of our country opted for the balance of limited government, which has become a blessing to our citizens and a tradition revered at home and famous abroad. Limited government necessarily entails some limits on the government.

SEE, Justice (concurring in the result).

Based on the particular facts of this case, I agree that the seizure of the plastic box from Warren's pants pocket was unconstitutional. However, I disagree with the main opinion's apparent rationale that the seizure of all such hard containers in unconstitutional because their contents cannot be apparent until the officer seizes and opens them.

In *Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993), in analogizing the plain-feel doctrine to the plain-view exception to the warrant requirement, the Supreme Court of the United States made probable cause the touchstone for the warrantless seizure of an object felt during an authorized patdown. *Minnesota v. Dickerson*, 508 U.S. 366, 375, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993). Probable cause is determined by the totality of the circumstances. *Illinois v Gates*, 462 U.S. 213, 229, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The assessment of probable cause turns on the weighing of probabilities in particular factual context, and it requires that the collected evidence "be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Id*. at 231, 103 S.Ct. 2317 (citing *United States v. Cortez*, 449 U.S. 411, 418, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981)); accord *Allen v. State*, 689 So.2d 212, 216 (Ala.Crim.App. 1995) ("The facts giving rise to probable cause must be viewed in light of the officer's own experience and training."). The evidence in this case does not establish that Detective Wilson had probable case to believe that the plastic box in Warren's pocket contained narcotics; thus, the warrantless seizure was not justified.

However, by making probable cause the focus of the plain-feel doctrine, *Dickerson* clearly contemplates situations in which an investigating officer would have probable cause to believe that a hard object contains illegal contraband. For example, in *People v. Champion*, 452 Mich. 92, 549 N.W.2d 849 (1996), cert. denied, 519 U.S. 1081, 117 S.Ct. 747 (1997), a case cited in both the majority opinion and Chief Justice Hooper's dissent, the Michigan Supreme Court held that an officer was justified in seizing a pill bottle that he felt in the defendant's groin area during a *Terry* frisk. The court concluded that, based on the totality of the circumstances, the officer had probable cause to believe the pill bottle contained contraband: the defendant got out of his car and walked away upon seeing the patrol car and uniformed officers, the defendant was known to have previous drug and weapons convictions, the officers were in a ***97** high drug crime area, the defendant tucked his hands in the front of his sweatpants while walking away from the officers and refused to remove them after being repeatedly asked to do so, and the officer's experience in narcotics investigation made him aware that controlled substances were often carried in the type of pill bottle he felt. 452 Mich. at 111, 549 N.W.2d at 859. I agree with the *Champion* court's conclusion that although feeling a pill bottle, in and of itself, would not give a police officer probable cause to seize the object, the totality of the circumstances present in the *Champion* case provided probable cause.

A per se rule like the one announced in the main opinion today will serve only to encourage the packaging and transporting of illicit drugs in hard containers, because the contents of such containers can never be "immediately apparent.' I would hold only that, under the totality of the circumstances of this case, Detective Wilson, upon feeling the Tic–Tac box in Warren's pocket, did not have probable cause to believe that that particular hard box contained illicit narcotics; therefore, Detective Wilson's seizure of that item was unconstitutional.

HOOPER, Chief Justice (dissenting).

I agree with Justice Maddox's dissenting opinion. I would add that the main opinion is the kind of writing that requires a police officer to have a Ph.D. in legal esoterica.

Here, again, are the key facts: The police received a call from a confidential informant, who told them that a group of black males standing around a white car were buying and selling drugs. The informant provided a street address, a description of the car, and a partial license-plate number of the car (all digits but the last). Two detectives drove to the scene in an unmarked police car and found the scene as the informant had described it. The two detectives walked toward the white car and decided to patdown the men for weapons. One of the detectives felt a "plastic box" in Warren's pocket. The box turned out to be a Tic Tac box containing several small rocks of cocaine. The majority states that the seizure of this contraband cannot be justified under the "plain-feel doctrine" because the detective could not know, before seizing it, that the plastic box contained contraband. The search established that the Tic Tac box contained cocaine. We cannot continue to tie the hands of law-enforcement officers.

I find two cases, one a state court case and the other a federal case, analogous to this one. In *People v. Champion,* 452 Mich. 92, 549 N.W.2d 849 (1996), cert. denied, 519 U.S. 1081, 117 S.Ct. 747, 136 L.Ed.2d 685 (1997), the Michigan Supreme Court held that the officer was justified in seizing a pill bottle that he felt between the defendant's leg and groin area during a protective patdown, because the officer was patrolling a high crime area when he saw the defendant get out of a car and walk away upon seeing a patrol car and uniformed officers, the officer recognized the defendant and knew of his previous convictions for drug and weapons offenses, the defendant tucked his hands in the front of his sweatpants and refused

to take them out despite repeated requests by the officer, and the officer had considerable experience in dealing with drug cases and was aware that drugs are often carried in pill bottles like the one he felt while patting down the defendant.

In *United States v. Salazar,* 945 F.2d 47 (2d Cir.1991), a case cited in a footnote in *Dickerson,* supra, the United States Court of Appeals for the Second Circuit found probable cause to seize plastic vials containing crack cocaine from inside the defendant's coat pocket because drug agents ***98** had received a tip from a first-time informant telling them that the defendant was selling crack cocaine from a specific address; the agents verified certain of the details of the informant's tip; the defendant appeared nervous upon seeing the agents; and, during his protective patdown of the defendant, an agent felt the "crackling of plastic" that he recognized from previous experience as plastic vials commonly used for holding crack cocaine. That court recognized that "where the officers have been informed that a given person is dealing in narcotics, and during a permissible pat-down for weapons they feel something that their experience tells them is narcotics, the pat-down gives them probable cause to search the suspect for drugs." 945 F.2d at 51. Allowing any less discretion on the part of the police would mean that we require police officers to unnaturally deny their own common sense and experience in dealing with drug suspects. It also would require them to know the most minute intricacies of arcane legal thinking that the most experienced lawyers and judges disagree about and that they be able to predict which side will win in court when the defendant appeals that particular case. I refuse to participate in such shackling of our law-enforcement personnel.

The circumstances surrounding this particular patdown of Warren justified the officer's confiscation of the contraband. I would affirm the judgment of the Court of Criminal Appeals. Therefore, I must respectfully dissent.

MADDOX, Justice (dissenting).

I conclude that, given all the facts and circumstances the officer possessed when he seized the crack cocaine, he had sufficient probable cause to make the seizure, and I conclude that the Court of Criminal Appeals properly analyzed the facts and the applicable law and properly applied that law in this case. On the contrary, I believe that the majority incorrectly interprets the provisions of the Fourth Amendment as interpreted by the Supreme Court of the United States in *Minnesota v. Dickerson,* 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993). See, also, *Illinois v. Wardlow,* 528 U.S. 119, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000), where the United States Supreme Court upheld a search and seizure involving illegal drugs based upon all the facts and attendant circumstances shown in that case. In *Wardlow,* the United States Supreme Court stated the facts as follows:

> "On September 9, 1995, Officers Nolan and Harvey were working as uniformed officers in the special operations section of the Chicago Police Department. The officers were driving the last car of a four car caravan converging on an area known for heavy narcotics trafficking in order to investigate drug transactions. The officers were traveling together because they expected to find a crowd of people in the area, including lookouts and customers.
>
> "As the caravan passed 4035 West Van Buren, Officer Nolan observed respondent Wardlow standing next to the building holding an opaque bag. Respondent looked in the direction of the officers and fled. Nolan and Harvey turned their car southbound, watched him as he ran through the gangway and an alley, and eventually cornered him on the street. Nolan then exited his car and stopped respondent. He immediately conducted a protective pat-down search for weapons because in his experience it was common for there to be weapons in the near vicinity of narcotics transactions. During the frisk, Officer Nolan squeezed the bag respondent was carrying and felt a heavy, hard object similar to the shape of a gun. The ***99** officer then opened the bag and discovered a .38 caliber handgun with five live rounds of ammunition. The officers arrested Wardlow."

528 U.S. at 121–22, 120 S.Ct. at 674–75. The issue in *Wardlow* was whether Officer Nolan was justified in conducting a stop-and-frisk search of Wardlow under *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The United States Supreme Court determined that he was.

I believe the facts and circumstances of this case are analogous to those set out in *Wardlow.* Consequently, I must respectfully dissent.

All Citations

783 So.2d 86

Footnotes

1 This Court discussed the plain-feel doctrine in *Ex parte James,* [Ms. 1980820, June 23, 2000] —— So.2d —— (Ala.2000), in which we held that an officer had improperly seized marijuana cigarettes from the defendant James's pocket. Our holding in *James* was not based on the plain-feel doctrine, however. In *James,* the officer testified that as he was conducting a *Terry* patdown search James started to put his hand into his pants pocket. As James pulled his hand out, the officer said that he reached into James's pocket and found marijuana cigarettes. The officer testified that he did not pat the outside of James's pocket before he reached into it and that he did not feel any weapons during the patdown search. Because the officer, before he put his hand into the pocket and removed the marijuana cigarettes, did not pat down the outer surface of James's pocket to determine if a weapon was present and therefore did not feel any weapon or "plain-feel" object that would warrant further intrusion, we concluded that the plain-feel doctrine did not apply because the officer did not inadvertently discover the contraband pursuant to a *Terry* patdown search.

2 *Stevenson* arose out of suspicious circumstances, as did the case before us. An officer on patrol saw the defendant enter a residence that had been the subject of numerous complaints regarding drug activity. The officer stopped the defendant for a traffic violation. During the course of a *Terry* search, the officer felt three hard packages of folded paper or cardboard in the defendant's pants pocket. The court noted that "cardboard or folded paper may be in an individual's pocket for any number of legitimate reasons, and may contain, if anything at all, any number of legitimate items." 560 Pa. at 358 n. 6, 744 A.2d at 1268 n. 6.

3 In *Bridges,* also a case involving suspicious circumstances, the officer received a telephone call from a confidential informant, who told him that the defendant was at the time selling drugs at a club. The defendant was present at the club when the officer arrived. The officer said he frisked the defendant for weapons. During that search, the officer felt a pill bottle in the defendant's pocket.

4 In *Ross,* officers stopped the defendant's car after they had observed him circling a motel known to be an area of high drug trafficking. The defendant was shivering in the cold January night air, so an officer performed a *Terry* search so that the defendant could sit in a patrol car. During the search, the officer felt a box tucked into the defendant's groin area. The officer identified it as a hollow matchbox. He testified that he was suspicious because of the box's location in the groin area, that drug traffickers were widely known to carry drugs in that area of the body, and that it was common for drug traffickers to carry contraband in small plastic boxes, steel boxes, or matchboxes. The officer also said that approximately 50–100 times he had found contraband concealed in small matchboxes tucked in the groin area.

5 We note that *Champion,* relied on by Chief Justice Hooper in his dissent and by the Court of Criminal Appeals, presented a scenario factually different from that presented in the case before us. In *Champion,* the law-enforcement officer testified that during his patdown search, he felt "a pill bottle stuck down between [Champion's] legs." 452 Mich. at 110 n. 9, 549 N.W.2d at 858 n. 9. No comparable circumstance is here presented. In the case before us, Wilson felt the Tic Tac box in Warren's pants pocket. The dissent also relies upon *United States v. Salazar,* 945 F.2d 47 (2d Cir.1991), a case that was decided before *Dickerson. Salazar* is cited once in *Dickerson* as one of several cases recognizing the "plain-feel" analog to the plain-view rule announced in *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) (opinion of Stewart, Douglas, Brennan, and Marshall, JJ.) The Court in *Dickerson* made no effort to harmonize or reconcile its holding there with the holdings in such cases as *Salazar.*

6 Chief Justice Hooper's dissenting opinion complains of "shackling of our law-enforcement personnel." 783 So.2d at 98. The framers of both the United States Constitution and the Alabama Constitution saw fit to guarantee citizens freedom from illegal searches and seizures (see U.S. Const. amend. IV; Ala. Const. of 1901, Art. I, § 5), and we hereby enforce that guaranty today.

* Justice Brown represented the State of Alabama in this case while she was serving as an assistant attorney general.

353 F.2d 624
United States Court of Appeals Ninth Circuit.

Manuel L. HERNANDEZ, Appellant,

v.

UNITED STATES of America, Appellee.

No. 19654.
|
Oct. 29, 1965, Rehearing Denied Jan. 18, 1966.

Synopsis

Defendant was convicted in the United States District Court for the Southern District of California, Central Division, C. Nils Tavares, J., of transporting and concealing narcotics, and he appealed. The Court of Appeals, Browning, Circuit Judge, held that purchase by prospective passenger, carrying very heavy luggage and without a reservation, of a first-class airline ticket, together with use of certain type of combination lock luggage, payment in bills of large denomination, and apparent Latin-American derivation of the party, all of which elements had been previously noticed by police in movement of narcotics by airplane, furnished reasonable ground for police to have believed that defendant's suitcases contained another shipment of narcotics.

Affirmed.

Browning, Circuit Judge, dissented from decision on petition for rehearing.

Attorneys and Law Firms

***625** Ronald S. Rosen, Hollywood, Cal., for appellant.

Manuel L. Real, U.S. Atty., Shelby Gott, Asst. U.S. Atty., Los Angeles, Cal., for appellee.

Before POPE, MERRILL, and BROWNING, Circuit Judges.

Opinion

***626** BROWNING, Circuit Judge.

Appellant was convicted of transporting and concealing 114 pounds of marihuana on April 5, 1964, in Los Angeles County, California, in violation of 21 U.S.C.A. § 176a. He asserts that his conviction was based upon evidence (the 114 pounds of marihuana) secured through an unconstitutional search and seizure of two suitcases and a briefcase at the Los Angeles International Airport.

Los Angeles police had observed a recurring pattern in incidents involving the illicit transportation of marihuana. Large lots of marihuana were being brought to Los Angeles from Mexico by automobile, then carried from Los Angeles to New York City in the luggage of persons traveling on commercial air flights. The couriers were Latin-Americans. They traveled first class on nonstop flights. They did not make advance reservations. Their luggage was new and expensive, usually bore the brand name 'Ventura,' and had combination locks. Their bags were exceedingly heavy because of the weight of the marihuana. They paid their fares and weight overcharges in cash with bills of large denomination. Eight such cases had been investigated in the two years preceding appellant's apprehension. Sergeant Butler, who searched appellant's bags, had participated personally in four such investigation during the preceding year- one, a week prior to the search of appellant's bags.

Airport employees were asked to notify the police immediately if a person fitting the described pattern appeared. At about 8:30 p.m. on April 5, 1964, a ticket agent at the Los Angeles airport called the airport police substation. Sergeant Butler responded. The ticket agent told him that a person later identifield as appellant had purchased a first-class ticket on a 10:50 p.m. nonstop flight to New York, that he had no advance reservation, that his two bags weighed 155 pounds (115 pounds in excess of the 40 pounds which could be carried without additional charge), and that he had paid for his fare and overweight charges with one hundred-dollar bills.

Sergeant Butler went to the storage area in the airport terminal building where appellant's bags had been sent to await loading. The bags were new 'Ventura' bags with combination locks. Sergeant Butler lifted them to feel their weight. He pressed their sides together, forcing air from the interior. Smelling the escaping air, he detected odor of marihuana and called the police department's narcotics division. Two officers responded. They too lifted the bags, squeezed them, and smelled the escaping air. They and Sergeant Butler then located appellant upstairs in a public bar in the terminal building and arrested him. The bags were opened after appellant's arrest.

The government argues that the bags were not searched until they were opened. We cannot agree. The manipulation of appellant's bags by Sergeant Butler prior to appellant's arrest constituted a 'search' within the meaning of the Fourth

Amendment. The contents of the bags were not exposed to Sergeant Butler's sight or smell before the bags were squeezed. He detected the odor of marihuana as the result of an 'exploratory investigation,' an 'invasion or quest,' a 'prying into hidden places for that which was concealed'- conduct which has been repeatedly said to characterize a 'search.' 38 Words & Phrases 401-02 (Perm. 2d), 123-26 (1965 P.P.) Technical trespass is not required. Silverman v. United States, 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961). See also Regalado v. California, 374 U.S. 497, 83 S.Ct. 1875, 10 L.Ed.2d 1044 (1963); McDonald v. United States, 335 U.S. 451, 454 (1948) But even if it were, it occurred here. 'A trespass to a chattel may be committed by intentionally * * * using or intermeddling with a chattel in the possession of another.' Restatement 2d, Torts § 217 (1964). See also Prosser, Law of Torts 76 (3d ed. 1965).

***627** The question remains whether the search of appellant's bags violated the Fourth Amendment. Sergeant Butler had no warrant. Hence the search was invalid unless made (1) incident to a lawful arrest, or (2) in 'exceptional circumstances'- in this case, that contraband was threatened with imminent removal or destruction. United States v. Ventresca, 380 U.S. 102, 106-107, 107 n. 2, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965); Cipres v. United States, 343 F.2d 95, 98 n. 9 (9th Cir. 1965). See also Chapman v. United States, 365 U.S. 610, 614-616, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961); United States v. Jeffers, 342 U.S. 48, 51, 72 S.Ct. 93, 96 L.Ed. 59 (1951); Johnson v. United States, 333 U.S. 10, 14-15, 68 S.Ct. 367, 92 L.Ed. 436 (1948).

(1) We hold that the search was not incident to appellant's subsequent arrest in the upstairs bar- not because it was too 'remote in time or place from the arrest' (see Preston v. United States, 376 U.S. 364, 367, 84 S.Ct. 881, 883, 11 L.Ed.2d 777, (1964)) (a question we do not reach)- but rather, because the search was in fact independent of the arrest. Sergeant Butler did not go to the storage area to arrest appellant and incidentally search him and his bags. He knew appellant was not there. His sole purpose was to search the bags. See Lustig v. United States, 338 U.S. 74, 79-80, 69 S.Ct. 1372, 93 L.Ed. 1819 (1949); Jones v. United States, 357 U.S. 493, 500, 78 S.Ct. 1253, 2 L.Ed.2d 1514 (1958); Taylor v. United States, 286 U.S. 1, 6, 52 S.Ct. 466, 76 L.Ed. 951 (1932).

(2) The burden rested on the government to prove that it would not have been practical to secure a warrant before the bags were removed. United States v. Jeffers, 342 U.S. 48, 51, 72 S.Ct. 93, 96 L.Ed. 59 (1951). Cf. Cohen v. Norris, 300 F.2d 24, 32 (9th Cir. 1962). The police were first contacted at 8:30 p.m. Appellant and his luggage were scheduled to depart at 10:50 p.m. There was uncontradicted testimony that a warrant could not have been obtained until the following morning. Compare Johnson v. United States, supra, 333 U.S. at 15, 68 S.Ct. 367. Absent contrary evidence, this was a sufficient showing.

The fact that it was impractical to secure a warrant 'did not dispense with the need for probable cause.' Henry v. United States, 361 U.S. 98, 104, 80 S.Ct. 168, 172, 4 L.Ed.2d 134 (1959). The trial court concluded that Sergeant Butler had reasonable grounds to believe that the bags contained contraband- though thinking it 'a very close question.' 'Giving due weight to that finding,' Wong Sun v. United States, 371 U.S. 471, 479, 83 S.Ct. 407, 413, 9 L.Ed.2d 441 (1963), we arrive at the same conclusion.

'The troublesome line * * * is one between mere suspicion and probable cause. That line necessarily must be drawn by an act of judgment formed in the light of the particular situation and with account taken of all the circumstances.' Brinegar v. United States, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1949). No one of the indicia drawn from prior incidents of illicit traffic was alone sufficient to justify a reasonable man in the belief that appellant's bags contained contraband, but taken together they rendered it probable. A search based upon their concurrence would not likely invade the privacy of an innocent person. See Sobel, Search & Seizure 52 (1964). Compare Ellis v. United States, 105 U.S.App.D.C. 86, 264 F.2d 372, 374 (1959).

No doubt first-class passengers do not always make reservations, and heavy luggage is not unusual. But there was testimony that it is 'very, very rare' for a first-class passenger who has heavy luggage to appear and purchase a ticket without prior arrangement.[1] There was also testimony that it is difficult to pack ***628** as much as 155 pounds of personal effects into two ordinary suitcases, but that bags containing bricks of marihuana seized in earlier incidents had comparable weights. These elements, taken together with the use of 'Ventura' combination-lock suitcases, payment in bills of large denomination, and the apparent Latin-American derivation of the passenger, were specific and narrowly descriptive; illuminated by Sergeant Butler's past experience, they furnished reasonable grounds for him to believe, in advance of the intrusion upon appellant's privacy, that appellant's suitcases contained another shipment of marihuana moving in an organized illicit traffic from the Mexican source of supply to the New York market. Indeed,

it has been suggested that less might have been sufficient: 'The police must have reasonable grounds to believe that the particular package carried by the citizen is contraband. Its shape and design might at times be adequate. The weight of it and the manner in which it is carried might at times be enough.' Henry v. United States, 361 U.S. 98, 104, 80 S.Ct. 168, 172, 4 L.Ed.2d 134 (1960).

As appellant states, Sergeant Butler had no prior information that a crime would be committed at this time or place or by this appellant. But probable cause 'is a practical, nontechnical conception.' Brinegar v. United States, supra, 338 U.S. at 176, 69 S.Ct. at 1311- no particular element must always be present; the presence of no one element is invariably conclusive. The presence or absence of probable cause is to be determined 'in the light of * * * all the circumstances,' ibid.- it is immaterial that each circumstance, taken by itself, may be consistent with innocence. See United States v. Bianco, 189 F.2d 716, 720 (3d Cir. 1951).

To sustain the finding of probable cause on this record is not to authorize officers to conduct general searches for unknown offenders on mere suspicion. A search cannot be used as an investigative technique for securing evidence of the commission of crime. Cf. Stanford v. State of Texas, 379 U.S. 476, 481-484, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965); Note, 28 U.Chi.L.Rev. 664, 697 (1961); Kamisar, 44 Minn.L.Rev. 891, 914 (1960). The circumstances upon which Sergeant Butler relied were within his knowledge before the search was initiated, and were sufficient to justify a reasonable man in believing that the very bags which Sergeant Butler searched did in fact contain marihuana.

Following appellant's arrest a search of his person revealed a key to an airport locker. The police opened the locker and found a briefcase. They opened the briefcase and discovered two bricks of marihuana, part of the total of 114 pounds to which the one-count indictment related. It is not clear whether appellant intended to contest the validity of this search independently of his attack upon the search of his suitcases. Since there may be practical reasons for not doing so, in view of our holding that the latter search was valid, we do not consider that issue, leaving it to appellant to raise it on petition for rehearing if he wishes to do so.

Affirmed.

Upon Petition for Rehearing

Responding to the suggestion of the Court, appellant requested that we consider the issue reserved in the final sentence of the Court's opinion. We have done so.

POPE and MERRILL, Circuit Judges, are of the view that, in the circumstances of this case, the error, if any, was harmless. The judgment of affirmance is therefore adhered to.

Affirmed.

BROWNING, Circuit Judge, dissents on the ground that the warrantless search of the locker was unlawful, and that the admission of evidence resulting from the search was not harmless.

All Citations

353 F.2d 624

Footnotes

1 Compare United States v. Bianco, 189 F.2d 716, 720 (3d Cir. 1951) ('The use of so large a case for so short a trip (Baltimore to Washington, D.C.) was extraordinary'). See also People v. McGowan, 415 Ill. 375, 114 N.E.2d 407, 410-411 (S.Ct.Ill.1953).

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422 F.2d 185
United States Court of Appeals, Fifth Circuit.

Arthur Earl MARSHALL, Appellant,

v.

UNITED STATES of America, Appellee.

No. 26037.
|
Jan. 22, 1970.

Synopsis

Defendant was convicted in the United States District Court for the Southern District of Texas, at Houston, Ben C. Connally, Chief Judge, for possession of illegally made firearm, and he appealed. The Court of Appeals, Goldberg, Circuit Judge, held that inasmuch as statute providing for tax on making of firearm requires approval of application prior to making, and it was virtually inconceivable that defendant could have received such approval, defendant's full compliance with statute would have meant not making firearm, eliminating any risk of self-incrimination; accordingly, defendant's conviction for possession of firearm made in violation of tax statute did not violate Fifth Amendment rights.

Affirmed.

Attorneys and Law Firms

***186** Robert Watson, Houston, Tex. (Court-appointed), for appellant.

Morton L. Susman, U.S. Atty., Donald L. Stone, James R. Gough, Asst. U.S. Attys., Houston, Tex., for appellee.

Before COLEMAN and GOLDBERG, Circuit Judges, and SKELTON, Judge of the Court of Claims.[a1]

Opinion

GOLDBERG, Circuit Judge:

Appellant Arthur Earl Marshall posits two fallibilities in his conviction for possession of an illegally made firearm.[1] First, he asserts error in the evidentiary use of the fruit of a search he deems illegal. Secondly, he claims that his conviction violated Fifth Amendment rights vouchsafed to him through Marchetti,[2] Grosso,[3] and Haynes.[4]

***187** The facts can be briefly summarized. On September 9, 1967, Roland A. Kinsey, Jr., a deputy sheriff in Harris County, Texas, was on his regular tour of duty as an accident investigator. At about 1:15 a.m. on that date he stopped to get a cup of coffee at a drive-in restaurant. While at the drive-in, he approached a car parked in the parking lot. Looking into the automobile, he observed appellant Marshall reclining in the driver's seat, a hat pulled down over his eyes, apparently asleep. Shining his flashlight into the car, Officer Kinsey noticed a sawed-off shotgun resting on the floorboard between Marshall's feet. He then opened the car door, awakened Marshall, and placed him under arrest.

On March 11, 1968, Marshall was tried in the United States District Court for the Southern District of Texas for possession of an illegally made firearm. On that date he was found guilty by the jury, and on March 28, 1968, he was sentenced by the court to a term of five years in prison. He now appeals his conviction to this court.

I.

At trial Marshall objected to the introduction of evidence concerning the shotgun on the ground that it had been obtained as the result of an illegal search. He contended that evidence regarding anything which Officer Kinsey observed by directing the beam of his flashlight into the car should be ruled inadmissible.

The trial judge heard evidence outside the presence of the jury to determine the merits of this claim. Officer Kinsey was questioned about the events preceding the arrest. According to his testimony, when he arrived at the drive-in his wife told him that the car had been parked in the parking lot for about an hour with its lights on and the driver lying back in the seat. During that time no one had emerged from the car to order food. Officer Kinsey said he regarded this as a highly unusual circumstance. His purpose in going over to the car, he explained, was to see whether anything was wrong. Officer Kinsey's testimony concerning his motivation for investigating the car was not contradicted.

After hearing this testimony, the trial judge overruled Marshall's objection to the admission of the evidence. He stated that, in his opinion,

'this was not a search of the car in the normal sense of the word. * * * (Officer Kinsey's) purpose was not to search it and

not to arrest, but to see if anything was wrong, sick or needed help, and I see nothing wrong in an officer doing what he did. No more than looking inside the car to see if the occupants are ill or injured or need help or anything like that.'

In his post-trial memorandum opinion the trial judge reaffirmed his ruling in these words:

'I incline to the view that there was no search of the automobile; but if there was, it was not illegal. The weapon fell within the plain view of the officer at a time when he was lawfully in a position to have that view. * * * The gun was therefore subject to seizure and admissible in evidence.'

Marshall now urges this court to declare the evidence inadmissible as the result of an illegal search. At first blush it would appear that his contention raises two questions: (1) whether there was a search, and (2) if there was a search, whether it was illegal. The second question, however, is not disputed on appeal. The government now concedes that if Officer Kinsey was conducting a search by shining the beam of his flashlight into the interior of the car, the search was illegal.[5] Consequently, the only question to be decided here is whether a Fourth Amendment search did in fact take place.

***188** Our starting point in analyzing this question must be the doctrine known as the 'plain view' rule. Under this rule 'it has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence.' Harris v. United States, 1968, 390 U.S. 234, 236, 88 S.Ct. 992, 19 L.Ed.2d 1067, 1069. Evidence concerning 'that which is in plain view is not the product of a search.' United States v. Barone, 2 Cir. 1964, 330 F.2d 543, 544, cert. denied, 377 U.S. 1004, 84 S.Ct. 1940, 12 L.Ed.2d 1053 (emphasis added); accord, Ker v. California, 1963, 374 U.S. 23, 43, 83 S.Ct. 1623, 10 L.Ed.2d 726, 744; Agius v. United States, 5 Cir. 1969, 413 F.2d 915, 919; Creighton v. United States, 1968, 132 U.S.App.D.C. 115, 406 F.2d 651, 652; Shorey v. Warden, Maryland State Penitentiary, 4 Cir. 1968, 401 F.2d 474, 478, cert. denied, 393 U.S. 915, 89 S.Ct. 241, 21 L.Ed.2d 201.

Under the circumstances of the case before us, if Officer Kinsey had observed Marshall's shotgun on the floorboard of the car in broad daylight by the use of the naked eye, the evidence thereby obtained would clearly come within the scope of the plain view rule. Even Marshall concedes this.[6] However, Marshall contends that the use of the flashlight as a means to detect the contents of the car transformed Officer Kinsey's activities into a search within the meaning of the Fourth Amendment.[7] We cannot agree.

The view that the use of a visual aid such as a flashlight changes the character of a visual encounter by a police officer has been repeatedly rejected by the courts. Dorsey v. United States, 1967, 125 U.S.App.D.C. 355, 372 F.2d 928, 931 ('Both appellants conceded before us that this could properly have been done in the daytime. We do not think the need to employ a visual aid at night in the form of a flashlight converts this from lawful into unlawful conduct.'); Petteway v. United States, 4 Cir. 1958, 261 F.2d 53, 54 ('It is well established that it is not a search to observe what is open and patent either in daylight or in artificial light.'); United States v. Callahan, D.Minn.1964, 256 F.Supp. 739, 745 ('It does not constitute a search to observe that which occurs openly in a public place and which is exposed to visual observation, and this rule includes observations whether made in daylight or in artificial light.'); see Safarik v. United States, 8 Cir. 1933, 62 F.2d 892, 895; cf. Haerr v. United States, 5 Cir. 1957, 240 F.2d 533.

Notwithstanding the abundant authority contrary to his position, Marshall contends that the use of a flashlight in the present case converted Officer Kinsey's visual scanning of the car into a search. He cites as his only authority a state court case, Pruitt v. State, Tex.Crim.App.1965, 389 S.W.2d 475. Pruitt involved a conviction for unlawful transportation of wine in a dry area. The Texas Highway Patrolman who arrested Pruitt testified that he stopped Pruitt's car, late at night on a deserted country road, to check Pruitt's driver's license. After Pruitt showed him his license, the patrolman directed the beam of his flashlight into the car and discovered the prohibited wine in the back seat of the car. The Texas Court of Criminal Appeals reversed Pruitt's conviction, holding that the evidence concerning the wine was the product of an illegal search.

***189** There is language in the Pruitt opinion which implies that the use of a flashlight converts what would otherwise be a non-accusatory visual encounter into a Fourth Amendment search. 389 S.W.2d at 476-477. This language is, in our view, both unpersuasive and contrary to the great weight of authority.[8] However, the basis of the holding in Pruitt appears to be the Texas court's view of the police officer's intent. The court concluded from the evidence in the record that the officer's real purpose in stopping Pruitt's car was to investigate for evidence of some law violation other than non-possession of a valid driver's license. 389 S.W.2d at 476. The Texas court's conclusion that the arresting officer had the intent to

search for evidence of the commission of a crime makes the holding in Pruitt inapposite to the present case.

In the case before us there was no intent to conduct a Fourth Amendment search.

'A search implies an examination of one's premises or person with a view to the discovery of contraband or evidence of guilt to be used in prosecution of a criminal action. The term implies exploratory investigation or quest.' Haerr v. United States, 5 Cir. 1957, 240 F.2d 533, 535.

Here there was no probing, exploratory investigation for evidence of crime. According to Officer Kinsey's uncontradicted testimony, he was not motivated by an intention to search for evidence of a law violation. He was not even called to the scene as a law officer. He came merely as a husband to drink coffee at the restaurant where his wife was employed. She asked him to look at a car whose lights had been burning for an hour and whose occupants had not ordered anything from the restaurant. When he complied with her request, his investigation of the car was motivated by a desire to render assistance rather than an intent to uncover any contraband or other evidence of crime. Surely this samaritan investigation cannot give rise to a genuine Fourth Amendment complaint on the part of Marshall. Humanitarian scanning is not Fourth Amendment searching, even when it occurs after dark with the aid of a flashlight.

We do not hold, of course, that every use of a flashlight is not a search. A probing, exploratory quest for evidence of crime is a search governed by Fourth Amendment standards whether a flashlight is used or not. The mere use of a flashlight, however, does not magically transmute a non-accusatory visual encounter into a Fourth Amendment search. When the circumstances of a particular case are such that the police officer's observation would not have constituted a search had it occurred in daylight, then the fact that the officer used a flashlight to pierce the nighttime darkness does not transform his observation into a search. Regardless of the time of day or night, the plain view rule must be upheld where the viewer is rightfully positioned, seeing through eyes that are neither accusatory nor criminally investigatory. The plain view rule does not go into hibernation at sunset.

No one disputes the fact that Officer Kinsey had a right to be where he was when he first saw the shotgun, and we do not believe that his use of a visual aid converted his non-accusatory observation into a Fourth Amendment search. Convinced as we are that Officer Kinsey did not engage in a search within the meaning of the Fourth Amendment, we conclude that the government's evidence concerning the sawed-off shotgun was properly admitted by the court below.

II.

Marshall's second contention is that his conviction for possession of an illegally ***190** made firearm violated his Fifth Amendment rights. Having made a timely assertion of his privilege against self-incrimination in the court below, he now renews his contention that he cannot be subjected to criminal punishment under the statute here involved without a violation of that privilege. An assessment of Marshall's claim entails a consideration of the statutory scheme under which he was convicted, and to that we now turn.

Marshall was convicted of violating 26 U.S.C.A. § 5851, which forms part of the National Firearms Act.[9] Section 5851 makes criminal three separate offenses.[10] First, it is 'unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of' any of certain specified sections of the Act. Second, it is 'unlawful for any person to receive or possess any firearm * * * which has at any time been made in violation of section 5821.' Third, it is 'unlawful for any person * * * to possess any firearm which has not been registered as required by section 5841.' Section 5851 also contains a presumption based on possession:

'Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury.'

Marshall was convicted of violating the second provision of § 5851 by having in his possession a firearm (the sawed-off shotgun) which had been made in violation of § 5821.[11]

Section 5821 provides for a tax on the 'making' of 'firearms.'[12] The ***191** term 'making' is defined broadly to include any construction of a firearm 'whether by manufacture, putting together, alteration, any combination thereof, or otherwise.' 26 U.S.C.A. § 5821(a). Thus the statutory definition of 'making' clearly includes the alteration of a shotgun by sawing off the barrel. Moreover, it is undisputed that appellant Marshall's shotgun, after the barrel had been sawed off, constituted a 'firearm' as that term is defined in the Act.[13] It is also undisputed, however, that the tax on the making of this firearm was never paid as required by the provisions of § 5821.

With certain exceptions not here relevant,[14] § 5821 imposes a tax in the ***192** amount of $200.00 upon every making of a firearm in the United States. 26 U.S.C.A. § 5821(a); 26 C.F.R. § 179.75. The tax must be paid by the person making the firearm prior to the making of the firearm. 26 U.S.C.A. § 5821(c); 26 C.F.R. §§ 179.75, 179.77, 179.79. Payment of the tax is evidenced by a National Firearms Act tax stamp issued by the Internal Revenue Service. 26 U.S.C.A. § 5821(d); 26 C.F.R. § 179.75.

The statute sets out in general terms the procedures to be used in the payment and collection of the tax. 26 U.S.C.A. § 5821(e). Under the terms of the statute, anyone who intends to make a firearm must file a declaration of his intention prior to the making of the firearm. A tax stamp must be affixed to the declaration to show that the tax has been paid. If the declaration is filed by an individual, it must include the fingerprints and a photograph of the individual. In addition, the statute provides that the declaration 'shall be in such form and contain such information as the Secretary (of the Treasury) or his delegate may by regulations prescribe.'

Pursuant to this statutory mandate, the Secretary's delegate — the Director of the Alcohol and Tobacco Tax Division of the Internal Revenue Service— has promulgated regulations setting out more detailed requirements. Under these regulations,[15] the declaration constitutes an ***193** application to the Director for authorization to make the firearm. See 26 C.F.R. §§ 179.77, 179.79. The application must be made on a prescribed form known as 'Form 1A (Firearms).' 26 C.F.R. § 179.77. The application must identify the firearm by providing certain required information and must include a properly cancelled National Firearms Act tax stamp. Id. If filed by an individual, the application also must identify the applicant by name and address and must include a recent photograph of the applicant and his fingerprints. Id.; 26 C.F.R. § 179.78. In addition, an application filed by an individual 'must be supported by a certificate of the local chief of police, sheriff of the county, United States attorney, United States marshal, or such other person whose certificate may in a particular case be acceptable to the Director.' 26 C.F.R. § 179.78. The law enforcement official who signs the certificate must certify (1) that he is satisfied 'that the fingerprints and photograph appearing on the declaration are those of the declarant' and (2) that he is satisfied 'that the firearm is intended by such person for lawful purposes.' Id.

When completed, the application must be forwarded in duplicate to the office of the Director in Washington for his approval or disapproval. If the application is approved, the Director returns the original to the applicant and retains the duplicate. The regulations make it clear that the firearm cannot legally be made until after the application has been approved and returned to the applicant; 26 C.F.R. § 179.79 provides in pertinent part:

'Upon receipt of the approved declaration, the maker is authorized to make the firearm described therein. The maker of the firearm shall not, under any circumstances, make the firearm until the declaration, satisfactorily executed, with the 'National Firearms Act' stamp attached, has been forwarded to the Director, Alcohol and Tobacco Tax Division, and has been approved and returned by him.'

If the application is not approved, the Director retains the duplicate and returns the original to the applicant along with a statement of the reasons for disapproval. 26 C.F.R. § 179.79. When an application is not approved, the firearm cannot be made in compliance with the law.

With the statutory framework in mind, we turn to appellant Marshall's Fifth Amendment claim. Marshall contends that his conviction under the second provision of § 5851 violated his privilege against self-incrimination. In advancing this argument Marshall attempts to bring himself within the scope of the rationale underlying the decisions of the Supreme Court in the Marchetti-Grosso-Haynes trilogy and the subsequent Leary and Covington cases. ***194** Marchetti v. United States, 1968, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889; Grosso v. United States, 1968, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906; Haynes v. United States, 1968, 390 U.S. 85, 88 S.Ct. 722, 19 L.Ed.2d 923; Leary v. United States, 1969, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57; United States v. Covington, 1969, 395 U.S. 57, 89 S.Ct. 1559, 23 L.Ed.2d 94. These cases stand for the proposition that where compliance with a criminal statute would have subjected the defendant to 'real and appreciable' hazards of incrimination under other criminal legislation, his assertion of his privilege against self-incrimination precludes his conviction for non-compliance with the statute.

Marchetti and Grosso involved federal statutes requiring gamblers to register and pay certain taxes. The Court concluded that compliance with these registration and tax statutes would significantly enhance the likelihood of criminal prosecution under federal and state laws.

Consequently, the Court held that a defendant who raises a proper Fifth Amendment defense cannot be criminally punished for non-compliance with the registration and tax statutes. Leary and Covington involved transfer tax provisions of the Marijuana Tax Act. The Court, concluding that these provisions would force those who comply with them to incriminate themselves under state laws, held that non-compliance cannot be criminally punished in the face of a proper Fifth Amendment objection.

Haynes, the case upon which appellant chiefly relies, involved registration provisions of the National Firearms Act. Haynes was convicted of violating the third provision of 26 U.S.C.A. § 5851 by possessing a firearm which had not been registered as required by § 5841. Section 5841 provides that any person who possesses a firearm must register it unless he made or acquired the firearm in compliance with the provisions of the Act.[16] In other words, any person who possesses a firearm which he made or acquired in violation of the Act is required by § 5841 to register. It is obvious that this registration requirement places the possessor of a firearm acquired in violation of any of the Act's provisions in an impossible dilemma. If he fails to register, he is subject to punishment under both § 5841 (for failure to register) and § 5851 (for possession of an unregistered firearm). On the other hand, if he chooses to comply with the registration requirement, he thereby informs law enforcement officials that he acquired or made the firearm illegally. Because of this self-incrimination problem, the Court in Haynes held that a proper assertion of the Fifth Amendment privilege provides a full defense to any prosecution under § 5841 for failure to register a firearm. Moreover, on the basis of its conclusion that the offenses punishable under §§ 5841 and 5851 are not meaningfully distinguishable,[17] the Court held that a proper assertion of the Fifth Amendment privilege provides a full defense to any prosecution under § 5851 for possession of an unregistered firearm.

The Court did not consider in Haynes, nor has it considered subsequently, the applicability of the Marchetti-Grosso-Haynes rationale to prosecutions under the second provision of § 5851 for receiving ***195** or possessing a firearm 'which has at any time been made in violation of section 5821.' Lower courts, however, including this court, have considered this question. See Burton v. United States, 5 Cir. 1969, 414 F.2d 261; Lewis v. United States, 10 Cir. 1969, 408 F.2d 1310; Reed v. United States, 8 Cir. 1968, 401 F.2d 756, 761-763, cert. denied, 394 U.S. 1021, 89 S.Ct. 1637, 23 L.Ed.2d 48; DePugh v. United States, 8 Cir. 1968, 401 F.2d 346, 351-352; United States v. Thompson, D.Del.1968, 292 F.Supp. 757, 762-765; United States v. Benner, D.Or.1968, 289 F.Supp. 860; United States v. Casson, D.Del.1968, 288 F.Supp. 86; United States v. Taylor, E.D.Wis.1968, 286 F.Supp. 683; United States v. Stevens, D.Minn.1968, 286 F.Supp. 532; see also Moodyes v. United States, 8 Cir. 1968, 400 F.2d 360, 361 n. 2; United States v. Harvey, 7 Cir. 1968, 397 F.2d 526, 527 n. 2.[18] The courts have generally held that the second provision of § 5851 does not present a Fifth Amendment problem insofar as the possessor of the firearm is concerned.[19] Although the maker of the firearm is required by § 5821 to provide information about the firearm prior to its making, the possessor of the firearm after its making is not required to come forward and give information of any kind to anyone. Neither § 5851 nor § 5821 compels a possessor to incriminate himself in any manner.[20] At least one court, however, has perceived a self-incrimination problem when the same person is both possessor and maker. United States v. Thompson, supra. Self-incrimination in such a case does not occur because of federal law: if the maker of the firearm complies with § 5821 in making it, his continued possession thereafter is completely legal under the National Firearms Act and apparently violates no other federal statute.[21] However, one who completely complies with § 5821 in the making of a firearm may, in the course of his compliance, incriminate himself under state or local law.[22] For example, in a jurisdiction which flatly prohibits the making and possession of sawed-off shotguns, a person who makes a sawed-off shotgun in compliance with § 5821 will incriminate himself under local law by giving the information required on his application to make the firearm. Where circumstances of this nature exist, Thompson held, the privilege against self-incrimination can be asserted by one who is both maker and possessor as a defense to a prosecution under the second provision of § 5851. ***196** The Thompson court articulated this holding in these words:

'I hold, therefore, that in order for defendant to avail himself of the privilege against self-incrimination as an absolute defense to prosecution for possession of an unlawfully made firearm, he must satisfy the court that he was the maker of the gun and that at the time it was made there was in effect a law of the jurisdiction of its making which prohibited such weapons and provided criminal sanctions. Otherwise, the Fifth Amendment privilege is no defense to this aspect of the present prosecution.' 292 F.Supp. at 765.

Although the appellant in the case before us has not cited Thompson— in fact, he has not cited any of the post-Haynes

cases discussed herein— he has fashioned an argument which fits Thompson like a glove. He contends that he cannot be subjected to criminal punishment under § 5851 for possessing a firearm made in violation of § 5821 because (1) he was the person who made the sawed-off shotgun in violation of § 5821, and (2) if he had complied with § 5821 he would have incriminated himself under a state criminal statute. The state statute to which he directs our attention is Article 489c, Section 1, of the Texas Penal Code. Although the Texas Legislature has subsequently amended this statute, the provisions of the statute at the time Marshall made the sawed-off shotgun[23] were as follows:

'It shall be unlawful for any person who has been convicted of burglary or robbery, or of a felony involving an act of violence with a firearm under the laws of the United States or of the State of Texas, or of any other state, and who has served a term in the penitentiary for such conviction, to have in his possession away from the premises upon which he lives any pistol, revolver or any other firearm capable of being concealed upon the person.'

It is readily apparently that two aspects of the Texas statute make it something less than a general prohibition of possession of concealable weapons. First, the statute applies not to the public generally but only to certain persons with criminal records. Marshall, however, is apparently a person within the purview of the statute, for he tells us in his brief that he 'has been convicted of burglary more than once and has served terms in the State Penitentiary for such convictions.' Secondly, the statute prohibits not possession generally but only possession 'away from the premises upon which he lives.' This element of the statute might present a major impediment to Marshall's self-incrimination argument. It might be said that, because of this element of the statute, the incriminating link between compliance with the federal statute and a prosecution for violation of the Texas statute is too tenuous to come within the scope of the Marchetti-Grosso-Haynes rationale. In other words, the argument might be advanced that even if Marshall's hypothetical compliance with § 5821 would have alerted law enforcement officials that he was planning to make— and presumably possess— a sawed-off shotgun, his compliance with the federal statute would not have told anyone whether or not he was planning to possess the shotgun away from his home. However, we do not reach this issue because we perceive a more fundamental fallacy in Marshall's argument, and to that we now turn.

Our discussion of the fatal flaw in Marshall's Fifth Amendment argument must begin with a reiteration of ***197** the basic rationale underlying Marchetti, Grosso, and Haynes. As noted previously, these cases stand for the proposition that where compliance with a criminal statute would have subjected the defendant to 'real and appreciable' hazards of incrimination under other criminal legislation, his assertion of his Fifth Amendment privilege constitutes a complete defense to a prosecution for failure to comply with the statute. Thus the crux of Marshall's argument in this case is that if he had complied with § 5821, he would thereby have incriminated himself under the Texas statute. We find this argument totally devoid of merit. On the facts of this case, we are compelled to conclude that if Marshall had complied with the provisions of § 5821, he could not possibly have incriminated himself under the Texas statute because he would never have made the sawed-off shotgun at all.

It must be remembered that the statutory and regulatory scheme pertaining to the making of firearms is relatively complex; one who is complying with § 5821 must go through several steps before he is authorized to make the firearm. First, of course, he must pay the making tax. Secondly, he must file a completely executed application, and the application must be supported by a certificate of a local law enforcement official certifying that the official is satisfied that the applicant intends the firearm 'for lawful purposes.' 26 C.F.R. § 179.78. Then, after filing his application with the Director of the Alcohol and Tobacco Tax Division in Washington, the applicant must await the decision of the Director. After the application is returned to him he can legally make the firearm if his application has been approved. The Director's approval is a prerequisite to the making of a firearm in compliance with § 5821.

If for any reason a particular person is unable to receive the Director's approval, the only way he can comply with § 5821 is by not making the firearm. On the basis of the facts in this case, we have no choice but to conclude that Marshall was such a person, i.e., a person unable to receive the Director's approval. If he had attempted to submit an application to the Director, the only reasonable assumption we can make is that he would have been unable to supply one of the essential elements, the certificate of a local law enforcement official. It would strain the imagination to suppose that this man, with his record of convictions and incarcerations, could have persuaded a local law enforcement official to certify that he was satisfied that Marshall intended to make a sawed-off shotgun 'for lawful purposes.' To ask this court to reverse a conviction on the basis of such a supposition is asking too much. Perhaps we cannot say with delphic assurance that it is utterly and totally

impossible that Marshall could have secured the required certificate, but we can say that such a possibility is so remote that it exists only in the realm of fanciful speculation. We cannot base a decision on a hypothesis that extends so far beyond the horizon of reasonable anticipation. The privilege against self-incrimination is not to be speculated into existence. In the words of the Supreme Court, '* * * unlikely possibilities present only 'imaginary and insubstantial' hazards of incrimination, rather than the 'real and appreciable' risks needed to support a Fifth Amendment claim.' Minor v. United States, 1969, 396 U.S. 87, 97-98, 90 S.Ct. 284, 24 L.Ed.2d 283, 292.

The ship of Marshall's surmise must founder on the shore of reality, and we must conclude that Marshall could not have obtained the required certificate. Consequently, had he been complying with the law, Marshall would have had no choice but to abandon the idea of sawing off the shotgun once he realized that he could not complete the requirements necessary for a successful application. Thus his compliance with § 5821 could not have led to incrimination under the Texas statute for the simple reason that he would never have made the sawed-off shotgun.

***198** One possible problem remains. It might conceivably be argued that the mere filing of a partially completed application form could have incriminated Marshall under the Texas statute. The answer to this argument is obvious: If Marshall were complying with the statute, none of the information given on the application from could possibly incriminate him (in the absence of approval of his application) because he would not yet have made the firearm. Under § 5821, mere payment of the tax and filing of the application, without more, cannot constitute self-incrimination. Thus this case differs in an important respect from Marchetti, Grosso, and Haynes.[24] The difference lies in the comparative distances between the cup of disclosure and the lip of criminality in the statutory frames. In those cases the mere act of registering or paying the tax could automate criminal investigation directed toward the registrant or taxpayer. Here, however, completion of the steps necessary to constitute self-incrimination is not instantaneous with payment of the tax or filing of the application. Unless the § 5821 applicant is violating the requirements of the law, the information which he is required to divulge in making his application cannot tell law enforcement officials that he presently possesses a firearm; the only thing the information reveals is that the applicant is planning to make a firearm at some time in the future, i.e., after the Director approves his application. Therefore, so long as the applicant is complying with the provisions of § 5821 and the applicable regulations, no potentially harmful criminal investigation can be initiated until after the issuance of the Director's approval.

In this case we are compelled to reject appellant's contention that compliance with § 5821 would have incriminated him under the Texas statute. Since § 5821 requires approval of an application prior to making, and it is virtually inconceivable that Marshall could have received such approval, his full compliance with § 5821 would have meant not making the firearm. Thus he would not have been subjected to any risk of incrimination, and he therefore cannot assert a Fifth Amendment defense.

The judgment of the district court is

Affirmed.

All Citations

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Footnotes

a1 Sitting by designation as a member of this panel.

1 Marshall was convicted of violating 26 U.S.C.A. § 5851 by having in his possession a firearm which had been made in violation of 26 U.S.C.A. § 5821.

2 Marchetti v. United States, 1968, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889.

3 Grosso v. United States, 1968, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906.

4 Haynes v. United States, 1968, 390 U.S. 85, 88 S.Ct. 722, 19 L.Ed.2d 923.

5 The government's brief includes the following statement: 'The appellant contends, and it is not contested, that officer Kinsey did not have probable cause to search the vehicle.'

6 Appellant's brief includes the following passage:

'Of course, if the shotgun at issue in this appeal had been visible to the naked eye of Officer Kinsey, there would not have been a search, since presumably the mere existence of the shotgun in the floorboard of the automobile would have been an offense committed in the view of Officer Kinsey. It seems to be inescapable that, considering the fact that it was dark and the officer had no other means of detecting the exact contents of the automobile in question, the use by Officer Kinsey of the flashlight to inspect the automobile was definitely a search.'

7 See footnote 6, supra.

8 Despite the language to which we make reference, 389 S.W.2d at 476-477, we could not reasonably conclude that the Texas court consciously rejected the voluminous authority contrary to its point of view. The opinion in Pruitt indicates that the Texas court did not consider any of the cases cited in the present opinion which contradict the Texas court's language.

9 For a general discussion of the National Firearms Act see Haynes v. United States, 1968, 390 U.S. 85, 87-89, 88 S.Ct. 722, 19 L.Ed.2d 923, 926-928.

10 26 U.S.C.A. § 5851 provides:

It shall be unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of section 5811, 5812(b), 5813, 5814, 5844, or 5846, or which has at any time been made in violation of section 5821, or to possess any firearm which has not been registered as required by section 5841. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury.

11 The indictment returned against Marshall was in two counts. The first count charged him with violating the second provision of § 5851 by possessing a firearm which had been made in violation of § 5821. The second count charged him with violating the third provision of § 5851 by possessing a firearm which had not been registered as required by § 5841. The second count, however, was dismissed on motion of the government, and Marshall was tried and convicted on only the first count.

12 26 U.S.C.A. § 5821 provides:

(a) Rate.— There shall be levied, collected, and paid upon the making in the United States of any firearm (whether by manufacture, putting together, alteration, any combination thereof, or otherwise) a tax at the rate of $200 for each firearm so made.

(b) Exceptions.— The tax imposed by subsection (a) shall not apply to the making of a firearm—

(1) by any person who is engaged within the United States in the business of manufacturing firearms; (2) from another firearm with respect to which a tax has been paid, prior to such making, under subsection (a) of this section; or (3) for the use of— (A) the United States Government, any State, Territory, or possession of the United States, any political subdivision thereof, or the District of Columbia, or (B) any peace officer or any Federal officer designated by regulations of the Secretary or his delegate.

Any person who makes a firearm in respect of which the tax imposed by subsection (a) does not apply by reason of the preceding sentence shall make such report in respect thereof as the Secretary or his delegate may by regulations prescribe.

(c) By whom paid; when paid.— The tax imposed by subsection (a) shall be paid by the person making the firearm. Such tax shall be paid in advance of the making of the firearm.

(d) How paid.— Payment of the tax imposed by subsection (a) shall be represented by appropriate stamps to be provided by the Secretary or his delegate.

(e) Declaration.— It shall be unlawful for any person subject to the tax imposed by subsection (a) to make a firearm unless, prior to such making, he has declared in writing his intention to make a firearm, has affixed the stamp described in subsection (d) to the original of such declaration, and has filed such original and a copy thereof. The declaration required by the preceding sentence shall be filed at such place, and shall be in such form and contain such information, as the Secretary or his delegate may by regulations prescribe. The original of the declaration, with the stamp affixed, shall be returned to the person making the declaration. If the person making the declaration is an individual, there shall be included as part of the declaration the fingerprints and a photograph of such individual.

13 According to the evidence in the record, Marshall's sawed-off shotgun had a barrel length of only 12 1/4 inches and an overall length of only 19 1/2 inches. Thus his shotgun after alteration clearly came within the statutory definition of a 'firearm.' The statutory definition is found in 26 U.S.C.A. § 5848, which provides in pertinent part:

For purposes of this chapter—

(1) Firearm.— The term 'firearm' means a shotgun having a barrel or barrels of less than 18 inches in length, or a rifle having a barrel or barrels of less than 16 inches in length, or any weapon made from a rifle or shotgun (whether by alteration, modification, or otherwise) if such weapon as modified has an overall length of less than 26 inches, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm whether or not such firearm is included within the foregoing definition.

(4) Shotgun.— The term 'shotgun' means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.

14 The statutory exceptions are found in 26 U.S.C.A. § 5821(b), which is set out in full in footnote 12, supra. The provisions of 26 C.F.R. §§ 179.82, 179.83, and 179.84 also deal with exceptions to the making tax.

26 C.F.R. § 179.82 provides:

A manufacturer qualified under this part to engage in such business may make the type of firearm which he is qualified to manufacture without payment of the making tax. However, such manufacturer shall report and register each firearm made in the manner prescribed by this part.

26 C.F.R. § 179.83 provides:

A firearm may be made by, or on behalf of, the United States or any department, independent establishment, or agency thereof without payment of the making tax. However, if a firearm is to be made on behalf of the United States, the maker must file an application, in duplicate, on Form 1A (Firearms) and obtain the approval of the Director in the manner prescribed in § 179.77.

26 C.F.R. § 179.84 provides:

A firearm may be made without payment of the making tax by, or on behalf of, any State, or possession of the United States, any political subdivision thereof, or any official police organization of such a government entity engaged in criminal investigations. Any person making a firearm under this section shall first file an application, in duplicate, on Form 1A (Firearms) and obtain the approval of the Director as prescribed in § 179.77.

15 Relevant provisions of the regulations are found in 26 C.F.R. §§ 179.75, 179.77, 179.78, 179.79, 179.79a, and 179.81.

26 C.F.R. § 179.75 provides:

Except as provided in this subpart, there shall be levied, collected, and paid upon the making of a firearm a tax at the rate of $200 for each firearm made. This tax shall be paid by the person making the firearm. Payment of the tax on the making of a firearm shall be represented by a $200 adhesive stamp bearing the words 'National Firearms Act.'

26 C.F.R. § 179.77 provides:

No person shall make a firearm unless he has filed with the Director a written application, in duplicate, on Form 1A (Firearms) to make and register the firearm and has received the approval of the Director to make the firearm, which approval shall effectuate registration of the weapon to the applicant. The application shall identify the firearm to be made by serial number, model, length of barrel, and such other additional information as may be required on the Form 1A (Firearms). The applicant must identify himself on the Form 1A (Firearms) by name and address and, if other than a natural person, the name and address of the principal officer or authorized representative and, if an individual, the identification must include the information prescribed in § 179.78. A National Firearms Act stamp (see § 179.75) must be affixed to the original application in the space provided therefor and properly canceled (see § 179.81) if the making is taxable. If the making of the firearm is tax exempt under this part, an explanation of the basis of the exemption shall be attached to the Form 1A (Firearms). Form 1A (Firearms) and appropriate tax stamp may be obtained from any District Director of Internal Revenue.

26 C.F.R. § 179.78 provides:

If the declarant is an individual, he shall attach to each copy of the declaration an individual photograph of himself, taken within one year prior to the date of such declaration, and shall affix his fingerprints to such declaration. The fingerprints must be clear for accurate classification and should be taken by someone properly equipped to take them. The declaration must be supported by a certificate of the local chief of police, sheriff of the county, United States attorney, United States marshal, or such other person whose certificate may in a particular case be acceptable to the Director, Alcohol and Tobacco Tax Division, certifying that he is satisfied that the fingerprints and photograph appearing on the declaration are those of the declarant and that the firearm is intended by such person for lawful purposes.

26 C.F.R. § 179.79 provides:

The declaration of intent, to make a firearm, Form 1A (Firearms), must be forwarded directly, in duplicate, by the maker of the firearm to the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, Washington 25, D.C. The Director, Alcohol and Tobacco Tax Division, will consider the application for approval or disapproval. If the application is approved, the Director, Alcohol and Tobacco Tax Division, will return the original thereof to the maker of the firearm and retain the duplicate. Upon receipt of the approved declaration, the maker is authorized to make the firearm described therein. The maker of the firearm shall not, under any circumstances, make the firearm until the declaration, satisfactorily executed, with the 'National Firearms Act' stamp attached, has been forwarded to the Director, Alcohol and Tobacco Tax Division, and has been approved and returned by him. If the application is disapproved, the original Form 1A (Firearms) with the 'National Firearms Act' stamp attached thereto will be returned to the maker with the reasons for disapproval stated on the form.

26 C.F.R. § 179.79a provides:

An application to make a firearm shall not be approved by the Director if the making or possession of the firearm would place the person making the firearm in violation of the law.

26 C.F.R. § 179.81 provides:

The person affixing to a Form 1A (Firearms) a 'National Firearms Act' stamp shall cancel it by writing or stamping thereon, in ink, his initials, and the day, month and year, in such manner as to render it unfit for reuse. The cancellation shall not so deface the stamp as to prevent its denomination and genuineness from being readily determined.

16 26 U.S.C.A. § 5841 provides:

Every person possessing a firearm shall register, with the Secretary or his delegate, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof. No person shall be required to register under this section with respect to a firearm which such person acquired

by transfer or importation or which such person made, if provisions of this chapter applied to such transfer, importation, or making, as the case may be, and if the provisions which applied thereto were complied with.

17 See Haynes v. United States, 1968, 390 U.S. 85, 90-95, 88 S.Ct. 722, 19 L.Ed.2d 923, 928-931.

18 For pre-Haynes decisions see Sipes v. United States, 8 Cir. 1963, 321 F.2d 174, cert. denied, 375 U.S. 913, 84 S.Ct. 208, 11 L.Ed.2d 150; Mares v. United States, 10 Cir. 1963, 319 F.2d 71.

19 See Burton v. United States, 5 Cir. 1969, 414 F.2d 261; Lewis v. United States, 10 Cir. 1969, 408 F.2d 1310; Reed v. United States, 8 Cir. 1968, 401 F.2d 756, 761-763, cert. denied, 394 U.S. 1021, 89 S.Ct. 1637, 23 L.Ed.2d 48; DePugh v. United States, 8 Cir. 1968, 401 F.2d 346, 351-352; United States v. Thompson, D.Del.1968, 292 F.Supp. 757, 762-765; United States v. Benner, D.Or.1968, 289 F.Supp. 860; United States v. Casson, D.Del.1968, 288 F.Supp. 86; United States v. Taylor, E.D.Wis.1968, 286 F.Supp. 683. But see United States v. Stevens, D.Minn.1968, 286 F.Supp. 532.

20 Burton v. United States, 5 Cir. 1969, 414 F.2d 261, 262-263; United States v. Benner, D.Or.1968, 289 F.Supp. 860, 861; United States v. Taylor, E.D.Wis.1968, 286 F.Supp. 683, 684; see Lewis v. United States, 10 Cir. 1969, 408 F.2d 1310, 1312; Reed v. United States, 8 Cir. 1968, 401 F.2d 756, 763; United States v. Thompson, D.Del.1968, 292 F.Supp. 757, 764-765.

21 See Lewis v. United States, 10 Cir. 1969, 408 F.2d 1310, 1313; United States v. Thompson, D.Del.1968, 292 F.Supp. 757, 765; United States v. Casson, D.Del.1968, 288 F.Supp. 86, 89. See also United States v. Stevens, D.Minn.1968, 286 F.Supp. 532, 536. But cf. DePugh v. United States, 8 Cir. 1968, 401 F.2d 346, 350-351.

22 United States v. Thompson, D.Del.1968, 292 F.Supp. 757, 765; see United States v. Stevens, D.Minn.1968, 286 F.Supp. 532, 536; cf. DePugh v. United States, 8 Cir. 1968, 401 F.2d 346, 350-351.

23 The statute as quoted in the text was in effect from 1957 to 1969. In 1969, however, the statute was amended by the Texas Legislature, and it now reads in pertinent part as follows:

‘No person who has been convicted of a felony involving an act of violence may possess away from the premises upon which he lives a prohibited weapon (as defined by another provision of the Texas Penal Code), or a firearm having a barrel of less than 12 inches in length.’

24 Cf. Varitimos v. United States, 1 Cir. 1968, 404 F.2d 1030, 1033.

560 N.W.2d 687
Supreme Court of Minnesota.

In the Matter of the WELFARE OF G. (NMN) M., a/k/a W.M.

No. C9–95–812.
|
March 13, 1997.

Synopsis
Juvenile was adjudicated delinquent in the District Court, Clay County, Kathleen A. Weir, J., for controlled substance crimes. Juvenile appealed, and the Court of Appeals, Forsberg, Acting J., 542 N.W.2d 54, affirmed. Juvenile appealed. The Supreme Court, Tomljanovich, J., held that: (1) information provided by unknown informant provided officers with reasonable suspicion to conduct investigative stop of juvenile; (2) warrantless seizure and search of pouch from juvenile was not justified under plain view doctrine; (3) officers had probable cause to arrest juvenile for possession of cocaine such that seizure and search of pouch was valid seizure and search incident to arrest; and (4) juvenile's confessions made during custodial interrogation were voluntary and admissible.

Affirmed.

***689** *Syllabus by the Court*

1. Information provided by an anonymous informant had sufficient indicia of reliability to justify an investigative stop of a juvenile.

2. Under the plain-view exception to the warrant requirement, police could not seize a pouch they suspected contained cocaine unless the cocaine's incriminating nature was immediately apparent.

3. Information from an anonymous informant, combined with the suspicious answers of the juvenile, gave police probable cause to believe that cocaine was inside the pouch hanging from the juvenile's pocket, and, consequently, provided police with objective probable cause to arrest the suspect. The warrantless seizure and search of a juvenile's pouch, therefore, was a valid seizure and search incident to arrest.

4. A juvenile's statements made during a custodial interrogation were admissible when the juvenile failed to present evidence to rebut the state's showing by a fair preponderance of the evidence that the statements were voluntary.

Attorneys and Law Firms

Ann McCaughn, Assistant State Public Defender, Minneapolis, for Appellant.

Hubert H. Humphrey, III, St. Paul, Todd S. Webb, Clay County Attorney, Scott G. Collins, Moorhead, for Respondent.

Heard, considered and decided by the court en banc.

OPINION

TOMLJANOVICH, Justice.

The trial court on stipulated facts adjudicated G.M. delinquent based on actions constituting a controlled-substance crime in the second degree. A panel majority of the court of appeals affirmed the findings and order of the trial court, holding that the evidence was in plain view during a lawful stop and that G.M.'s statements were voluntary. *In re Welfare of G. (NMN) M.,* 542 N.W.2d 54 (Minn.App.1996). G.M. appeals, challenging the denial of his motion to suppress both the evidence seized and his statements, and his adjudication of delinquency. Although we disagree with the court of appeals' reasoning, we also affirm the order of the trial court.

At about 4:30 p.m. on January 25, 1995, an agent with the Bureau of Criminal Apprehension (BCA) observed a wired informant's conversation with an unknown person. The agent watched as the unknown person walked away from the informant and toward a bronze or copper colored Buick. The agent then watched as the unknown person spoke with the occupants of the car and then returned to the informant. The agent then heard over the wire as the unknown person told the informant that three males inside the car possessed cocaine. After observing the car leave the area, the agent declined to leave his surveillance post and instead relayed the car's description and license plate number to a deputy in the Clay County Sheriff's Department. The deputy subsequently relayed the information to the Moorhead police. Shortly thereafter, two Moorhead police officers observed three males walking away from a car that matched the description. The

officers stopped the three males, two of whom were the appellant, G.M., who was 17 years old at the time, and his 22–year–old brother. One of the officers asked the three suspects whether they were carrying weapons. G.M. replied no, but said he had a pouch in his possession that he found on the street. He offered that he did not know what it contained. The pouch, which was sticking out of G.M.'s pocket, was partially visible to the officers. After seizing the pouch and conducting a pat-down search of ***690** the three suspects, the officers looked inside the pouch and found what was later confirmed to be 15.1 grams of cocaine. Police also found G.M. to be carrying $600 in cash. The officers subsequently arrested all three suspects and transported them to the police station.

The police first interviewed G.M.'s brother, who made several incriminating statements against G.M. Because the officer conducting the interrogations became aware that G.M.'s father was deceased and his mother was living in Texas, the officer allowed G.M.'s brother to act in a parental capacity for G.M. Before interrogating G.M., therefore, the police officer allowed G.M. to speak with his brother alone for about 12 minutes. After being advised of his *Miranda* rights, G.M. indicated that he understood his rights and then stated that he was knowingly in possession of the cocaine.

The state charged G.M., as an extended-jurisdiction juvenile, with controlled-substance crimes in the first and second degrees in violation of Minn.Stat. § 152.021, subd. 1(1), subd. 3(a) (1994) (sale of 10 grams or more of a controlled substance) and § 152.022, subd. 2(1), subd. 3(a) (1994) (possession of 6 grams or more of a controlled substance). The trial court denied G.M.'s motion to suppress both the seized evidence and his statements. The court tried the case on stipulated facts pursuant to an agreement to dismiss the first-degree controlled substance charge. The court found that the state proved the petition beyond a reasonable doubt and adjudicated G.M. a delinquent child.

I.

G.M. raises several issues regarding the stop and subsequent seizure and search of the pouch. When reviewing the legality of a seizure or search, an appellate court will not reverse the trial court's findings unless clearly erroneous or contrary to law. *State v. Dickerson,* 481 N.W.2d 840, 843 (Minn.1992), *aff'd,* 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993). This court will review de novo a trial court's determination of reasonable suspicion as it relates to *Terry*[1] stops and probable cause as it relates to warrantless searches. *Ornelas v. United States,* 517U.S. 690, ——, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911 (1996). Before examining the seizure and search of the pouch, however, we must analyze the stop that led to its discovery.

The Moorhead police officers in the instant case stopped G.M. only after receiving a detailed description of the car, including the license plate number, from the Clay County Sheriff's Department. The sheriff's department, in turn, had received the information from a BCA agent who overheard a conversation between a wired informant and an unknown person. It is undisputed that the only person who claims to have actually seen the cocaine before the stop was the unknown person. It also is undisputed that this person was, and still is, unknown to police. Appellant contends that because it was this unknown person who provided the information, the police did not have reasonable suspicion to stop G.M. The state, on the other hand, contends that the police had reasonable suspicion in part because it was the confidential reliable informant who provided the information. Although we agree with the appellant's contention that it was the unknown person who provided the information,[2] that does not end our analysis. As we previously have stated, an unknown or anonymous person can, given other indicia of reliability, provide the basis for reasonable suspicion. *City of Minnetonka v. Shepherd,* 420 N.W.2d 887, 888 (Minn.1988). The legality of this ***691** stop, therefore, will turn on whether the circumstances of this stop provide such indicia.

"It is well settled that in accordance with the Fourth Amendment of the United States Constitution a police officer may not stop a vehicle without a reasonable basis for doing so." *Marben v. Department of Pub. Safety,* 294 N.W.2d 697, 699 (Minn.1980). A stop is lawful if the officer articulates a "particularized and objective basis for *suspecting* the particular persons stopped of criminal activity." *Berge v. Commissioner of Pub. Safety,* 374 N.W.2d 730, 732 (Minn.1985) (quoting *United States v. Cortez,* 449 U.S. 411, 417–18, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981)) (emphasis in *Berge*). The officer assesses the need for a stop "on the basis of 'all of the circumstances' " and " 'draws inferences and makes deductions * * * that might well elude an untrained person.' " *Id.* (quoting *Cortez,* 449 U.S. at 418, 101 S.Ct. at 695). The police may briefly stop a person and make reasonable inquiries when an officer observes unusual conduct that leads the officer to reasonably conclude in light of his or her experience that criminal activity may be afoot. *Minnesota v. Dickerson,* 508 U.S. 366, 373, 113 S.Ct. 2130,

2135–36, 124 L.Ed.2d 334 (1993) (citing *Terry v. Ohio,* 392 U.S. 1, 30, 88 S.Ct. 1868, 1884, 20 L.Ed.2d 889 (1968)). The information necessary to support an investigative stop need not be based on the officer's personal observations, rather, the police can base an investigative stop on an informant's tip if it has sufficient indicia of reliability. *State v. Cavegn,* 294 N.W.2d 717, 721 (Minn.1980). Police generally may not effect a stop on the basis of an anonymous informant's tip unless they have some minimal information suggesting the informant is credible and obtained the information in a reliable way. *Shepherd,* 420 N.W.2d at 890 (citing *State v. Davis,* 393 N.W.2d 179, 181 (Minn.1986)).

Ultimately, we must decide whether the information provided by an informant is reliable. To do so, we look both at the informant and the informant's source of the information and judge them against "all of the circumstances." *See Cortez,* 449 U.S. at 418, 101 S.Ct. at 695. Obviously, we base a large part of this analysis upon police knowledge of both the tipster and the factual circumstances surrounding the tip. It is undisputed that none of the police officers involved in this case have any significant knowledge of the unknown person who provided the tip.[3] It is equally undisputed, however, that the BCA agent had firsthand knowledge of the circumstances surrounding the tip.

Although nobody seems to know the identity of this unknown person, both the BCA agent and the confidential reliable informant saw and heard the unknown person as he spoke. In *State v. Davis,* we found that a face-to-face confrontation between a tipster and an officer puts a tipster in a position where police might be able to trace his identity, and consequently we concluded that police might be able to hold the tipster accountable for providing any false information. *Davis,* 393 N.W.2d at 181. Although the BCA agent did not confront the unknown person face-to-face, he did see the man. In addition, the confidential and reliable informant spoke face-to-face with the unknown person. It is highly likely the confidential reliable informant knows the identity of this unknown person, and that the BCA agent conceivably could contact this unknown person through the confidential reliable informant. Consequently, there is some, albeit not much, information regarding the anonymous tipster's identification.

Any weakness in the state's knowledge of the tipster's identity is overcome by the state's extraordinarily strong knowledge of the circumstances forming the basis for the tipster's information. Not only did the BCA agent observe the unknown person as he spoke with the confidential reliable informant, the agent observed as the unknown person walked up to the car in question, looked inside and spoke with its occupants. This information provided the agent with strong evidence that the unknown person based his tip upon a valid basis. *See Shepherd,* ***692** 420 N.W.2d at 891. Because we find there was both sufficient identification of the anonymous informant and a demonstrated basis for the informant's knowledge, we conclude that the information provided by the unknown person had sufficient indicia of reliability to provide the officers with reasonable suspicion to believe the three individuals inside the car may have been engaged in criminal activity. Thus, we conclude that the officers made a lawful investigative stop of G.M.

II.

G.M. also asserts that the warrantless seizure and warrantless search of the pouch subsequent to the *Terry* stop violated the Fourth Amendment. As the United States Supreme court has stated:

> The Fourth Amendment, made applicable to the States by way of the Fourteenth Amendment, guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Time and again, this Court has observed that searches and seizures conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.

Dickerson, 508 U.S. at 372, 113 S.Ct. at 2135 (citations and internal quotations omitted). Unless one of the well-delineated exceptions is applicable, police need both probable cause and a warrant before they can seize an item from a person. U.S. Const. amend IV. In addition, unless one of the well-delineated exceptions is applicable, the police need both probable cause and a warrant before they can search the seized item. *Id.* Although we hold that the warrantless seizure and subsequent warrantless search in this case were reasonable, we conclude that neither fit within the plain-view exception relied upon by the trial court and court of appeals. Instead, we conclude that the warrantless seizure and subsequent warrantless search of the pouch were reasonable because the police had probable cause to believe the pouch contained cocaine, and consequently, had objective probable cause to arrest the juvenile on the basis of that belief alone.

A. Parameters of plain-view exception

One of the more broad reaching exceptions to both the probable cause and warrant requirements is a *Terry* search or frisk. *Terry,* 392 U.S. 1, 88 S.Ct. 1868. Once police have reasonable suspicion to stop a person, *Terry* allows the police to conduct a pat-down search of the person without either probable cause or a warrant. *Id.* at 24, 88 S.Ct. at 1881. *Terry* requires only that the 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 to others." *Id.* Because police can conduct such a search without either probable cause or a warrant, however, the Supreme Court specifically has limited it "to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." *Id.* at 26, 88 S.Ct. at 1882. More particularly, *Terry* tells us that searches of the suspect's outer clothing in an attempt to discover weapons that might be used to assault the officer are reasonable. *Id.* at 29–30, 88 S.Ct. at 1884.

Terry does not necessarily limit, however, the fruits of those searches to weapons only. In *Michigan v. Long,* 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), the Supreme Court said that police may confiscate any evidence discovered "while conducting a legitimate *Terry* search." *Long,* 463 U.S. at 1050, 103 S.Ct. at 3481. The Court based this holding on the "plain-view" doctrine. *Id.; see also Coolidge v. New Hampshire,* 403 U.S. 443, 465, 91 S.Ct. 2022, 2037–38, 29 L.Ed.2d 564 (1971) (articulating plain-view seizure exception); *United States v. Hensley,* 469 U.S. 221, 235, 105 S.Ct. 675, 683–84, 83 L.Ed.2d 604 (1985) (upholding plain-view seizure in context of *Terry* stop). In *Dickerson,* the Court extended this doctrine to those "cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search." *Dickerson,* 508 U.S. at 375, 113 S.Ct. at 2137. The rationale of both plain view and plain touch is that if contraband is left in a place ***693** where police can either see or touch it, "there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons." *Id.* Consequently, police can, under certain circumstances, seize the item without a warrant so long as they have probable cause to believe the item or object is contraband. *Arizona v. Hicks,* 480 U.S. 321, 326, 107 S.Ct. 1149, 1153, 94 L.Ed.2d 347 (1987).

As the Court reiterated in *Dickerson,* however, this right to seize without a warrant an item that was discovered during a legitimate *Terry* search is not absolute. Instead, the police can seize an item under plain view or plain touch only if three conditions are met: 1) police were lawfully in a position from which they viewed the object, 2) the object's incriminating character was immediately apparent, and 3) the officers had a lawful right of access to the object. *Id.* at 375, 113 S.Ct. at 2136–37. Because we already decided there was reasonable suspicion to stop G.M., *Terry* tells us that the police were lawfully in a position from which they viewed the pouch. Consequently, the legitimacy of the seizure and subsequent search of the pouch will turn on whether the pouch's incriminating nature was immediately apparent and whether the officers had a lawful right of access to the pouch.

The Supreme Court has stated that if "police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object—i.e., if 'its incriminating character [is not] "immediately apparent," '—the plain-view doctrine cannot justify its seizure." *Dickerson,* 508 U.S. at 375, 113 S.Ct. at 2137 (citations omitted); *see also Hicks,* 480 U.S. 321, 107 S.Ct. 1149 (disallowing seizure of stereo equipment in plain view because police lacked probable cause to believe that it had been stolen). Conversely, when "evidence revealed in plain view * * * [gives] probable cause to believe" a crime has been committed, the object's incriminating character is immediately apparent and a warrantless seizure is justified. *Hensley,* 469 U.S. at 235, 105 S.Ct. at 684. This case, however, falls under neither of those constructs. Unlike *Hicks,* where the police did not have probable cause to believe the stereo equipment was stolen, the police in the case at bar likely had probable cause to believe the pouch contained contraband. And unlike *Hensley,* where the police officers gained *direct* view of weapons during a legitimate *Terry* stop and search, the police in the case at bar did not directly view the *contraband* until after they had seized the pouch and opened it.

Both the district court and court of appeals concluded that because the *pouch* was in plain view, and because the police officer had probable cause to believe the pouch *contained* contraband, that this case fit under the *Hensley* line of cases and justified both a seizure of the *pouch* and a search of its *contents.* As the court of appeals stated:

> Here, the police officers lawfully detained appellant for an investigative *Terry* stop and the purple pouch was in Officer Carlson's plain view at the time of the stop. Thus, the dispositive issue is whether the police had probable cause to believe the pouch *contained* contraband at the time it was seized.

In re Welfare of G. (NMN) M., 542 N.W.2d 54, 58 (Minn.App.1996) (emphasis added). This is a mistaken interpretation of the plain-view doctrine, however. Under the plain-view exception to the warrant requirement, a police officer can seize an object in plain view without a warrant only if the object's incriminating character is immediately apparent.[4] In this case, the object in plain view was the *pouch,* not the *contraband.* Consequently, the plain-view exception will apply only if the *pouch's* incriminating nature was immediately apparent. *See United States v. Ross,* 456 U.S. 798, 812, 102 S.Ct. 2157, 2166, 72 L.Ed.2d 572 (1982) (stating that closed opaque containers are ordinarily fully protected).

The court of appeals correctly stated that an object's incriminating nature becomes immediately apparent when the police have ***694** probable cause to believe "an object in plain view is contraband without conducting further search of the object." *Welfare of G. (NMN) M.,* 542 N.W.2d at 58. Although it is possible that the police had probable cause to believe that the pouch *contained* contraband, that belief came from an informant's tip and subsequent evasive answers from G.M.[5] In other words, the police's probable cause was not based upon what the officers saw in plain view, but upon what they heard from both the informant and G.M. Although the police saw the *pouch,* they never saw the *contraband* inside the pouch, and consequently the police cannot justify their warrantless seizure of the pouch on the belief that the incriminating nature of the pouch was immediately apparent.[6]

> As for the contents of a container, the mere fact that the container itself is in plain view provides no basis for a warrantless seizure and search of it, even assuming probable cause as to the contents. But if the contents themselves are in plain view within an accessible container, then there exists no reasonable expectation of privacy as to those contents and thus no need for a warrant to open the container.
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> 1 Wayne R. Lafave, *Search and Seizure* § 2.2(a), at 401–02 (3rd ed.1996); *see also United States v. Chadwick,* 433 U.S. 1, 11, 97 S.Ct. 2476, 2483, 53 L.Ed.2d 538 (1977) (holding that warrantless search of footlocker was unreasonable under Fourth Amendment). Such a distinction is critical in that plain view is based upon the fact that the defendant left the *contraband* in a place where he or she had no expectation of privacy. *Texas v. Brown,* 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) (what is required is a "degree of certainty that is equivalent to the plain view of the heroin itself"). In the case at bar, G.M. placed the contraband inside an opaque bag. It is true that such an expectation of privacy could have been defeated by a pat-down search of the pouch, *see Dickerson,* 508 U.S. at 377, 113 S.Ct. at 2137–38 (Stevens, J., concurring), but the police only conducted such a search after G.M. had handed them the pouch. Consequently, this case falls under *Chadwick* and not *Dickerson* or the other line of plain-view or plain-touch cases. This means police could not seize[7] the pouch unless they had both probable cause and a warrant, or, in the alternative, probable cause and a well-delineated exception to the warrant requirement other than plain view.

B. Search incident to arrest.

Although the state failed to present this court with any other possible warrant exceptions that could have applied to this seizure and search, we hold that because the police had probable cause to believe the pouch contained cocaine, they had objective ***695** probable cause to arrest G.M. and, therefore, could effect a warrantless seizure and warrantless search of the pouch under the "search incident to arrest" doctrine. *State v. Hannuksela,* 452 N.W.2d 668, 673–74, n. 7 (Minn.1990) (applying "severance doctrine" to uphold search even though neither side presented the court with such an argument). Under *Rawlings v. Kentucky,* 448 U.S. 98, 110–111, 100 S.Ct. 2556, 2564, 65 L.Ed.2d 633 (1980), police who have probable cause to arrest a suspect can then conduct a search incident to arrest even if the search occurs before the arrest. *See also State v. White,* 489 N.W.2d 792 (Minn.1992) (upholding search on basis of police officer's objective probable cause to arrest suspect for driving without a license). A search incident to arrest can extend to small containers on the person and can be followed by a warrantless seizure of discovered contraband. *United States v. Robinson,* 414 U.S. 218, 236, 94 S.Ct. 467, 477, 38 L.Ed.2d 427 (1973). The only limitation upon this doctrine is that the evidence discovered in the contemporaneous search cannot later be used to justify the finding of probable cause. *Smith v. Ohio,* 494 U.S. 541, 543, 110 S.Ct. 1288, 1290, 108 L.Ed.2d 464 (1990) (holding invalid an arrest based on contraband uncovered in search). The issue in this case, therefore, will turn on whether the police had objective probable cause to arrest G.M. prior to the seizure and subsequent search of the pouch.[8] We will review de novo a district court's finding of probable cause as it relates to a warrantless search. *Ornelas,* 517 U.S. at ——, 116 S.Ct. at 1663. We note at the outset that probable cause to search and probable cause to arrest are distinct. 2 Wayne R. LaFave, *Search and Seizure* § 3.1(b) (3rd ed.1996). Although one oftentimes will coincide with

the other, it is possible for police to have probable cause to search without having probable cause to arrest, and vice versa. *Id.* The distinction is not based upon the evidence required to create a sufficient level of suspicion, for the probable-cause standard is the same for both searches and arrests, but rather upon the object of the suspicion. *Id.* Whereas probable cause to search requires police to have a reasonable belief that incriminating evidence is in a certain location, *State v. Pierce,* 358 N.W.2d 672, 673 (Minn.1984), probable cause to arrest requires police to have a reasonable belief that a certain person has committed a crime, *State v. Wynne,* 552 N.W.2d 218, 221–22 (Minn.1996). As an example, a reasonable belief that there was cocaine inside a container would provide police with probable cause to search the container, but without something to connect the container with a certain individual, would not provide police with probable cause to arrest anybody for possession of cocaine. Although both parties in the case at bar argue whether police had probable cause to believe incriminating evidence (cocaine) was in a certain location (the pouch), the dispositive question under the "search incident to arrest" doctrine is whether police had probable cause to believe the suspect (G.M.) had committed a crime (possession of cocaine).

The test of probable cause to arrest is whether the objective facts are such that under the circumstances, a person of ordinary care and prudence would entertain an honest and strong suspicion that a crime has been committed. *Wynne,* 552 N.W.2d at 221. In the case at bar, the police had information from an anonymous informant that cocaine was in the car matching the description of that in which G.M. had been riding. Although it is unlikely that this tip alone provided probable cause that G.M. was in possession of cocaine, G.M.'s unsolicited statement that he did not know what was in the pouch hanging from his belt because he had just found the pouch, provided sufficient facts to establish probable cause that the pouch contained contraband and that the pouch was in the possession of G.M. A person of ordinary care could ascertain that people do not pick up pouches they find on the street—and attach them to their belts—without first looking inside. Consequently, it was reasonable for the police to conclude that ***696** G.M. was lying about his knowledge regarding the contents of the bag. Such an effort to deceive, combined with the information from the anonymous informant, provided the police with a strong suspicion that G.M. was in possession of cocaine. Because possession of cocaine is a crime, the police had probable cause to arrest G.M. even before seizing and searching the pouch. As a result, the subsequent seizure and search of the pouch was reasonable under the standard set forth in *Rawlings* and *White.*

III.

G.M. also challenges the admissibility of his statements on the grounds that they were involuntary. However, G.M. provides no evidence in support of his contention but instead asks this court to infer such a conclusion from the circumstances surrounding his statements. We refuse to make such an inference in the absence of any evidence that G.M.'s statements were not voluntary.

A confession is admissible only if it was freely and voluntarily given. *Haynes v. Washington,* 373 U.S. 503, 513, 83 S.Ct. 1336, 1343, 10 L.Ed.2d 513 (1963). Furthermore, the state must show by a preponderance of the evidence that the defendant gave the confession voluntarily. *State v. Andrews,* 388 N.W.2d 723, 730 (Minn.1986); *State v. Hoffman,* 328 N.W.2d 709, 714 (Minn.1982). An incriminating statement made to the police by a juvenile will be regarded as voluntary if the totality of the circumstances show that the statement was the product of a free-will decision. *Andrews,* 388 N.W.2d at 730; *State v. Ouk,* 516 N.W.2d 180, 184–85 (Minn.1994). This inquiry includes a consideration of factors such as the child's age, maturity, intelligence, education, experience, the presence or absence of parents, and the ability to comprehend. *Ouk,* 516 N.W.2d at 185; *State v. Hogan,* 297 Minn. 430, 440, 212 N.W.2d 664, 671 (1973).

The finding of the trial court as to the admissibility of G.M.'s confession will not be reversed unless it is clearly erroneous, but this court can make an independent determination of the voluntariness of the confession based on the record. *State v. Hardimon,* 310 N.W.2d 564, 567 (Minn.1981). A review of the record shows that the state met its burden of showing by a preponderance of the evidence that G.M.'s confession was voluntary. G.M. was 17 years old at the time of the interrogation, had a ninth-grade education, and was living on his own. G.M.'s parents were not present because his father was deceased and his mother was in Texas. Furthermore, the interrogating officer testified that he read G.M. his *Miranda* rights and that G.M. stated he understood those rights.

There is nothing in the record to indicate that G.M.'s statements were involuntary or that G.M. did not understand his rights. Rather, G.M. urges this court to infer from the circumstances surrounding his confession that his statements

were made involuntarily. We take note that the decision to have G.M.'s brother act in a parental capacity invites suspicion. The brother was, after all, a possible co-defendant who had made statements incriminating G.M. for possession of the cocaine. This fact alone does not rebut the state's proof that G.M.'s statements were given voluntarily, particularly in the absence of any further evidence supporting such a contention. Thus, under the totality of the circumstances, we conclude that G.M.'s confession was voluntary and therefore admissible.

Affirmed.

BLATZ, J., took no part in the consideration or decision of this case.

All Citations

560 N.W.2d 687

Footnotes

1 *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

2 The state cites *Adams v. Williams,* 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972) for the proposition that an informant's tip alone can provide reasonable suspicion. The facts as presented in *Adams* do not support that proposition, however. Although the Supreme Court found that a tip from a confidential reliable informant to a police officer on the scene provided the police with reasonable suspicion, *Id.* at 146–47, 92 S.Ct. at 1923–24, it is unclear from where the informant received his information. *Id.* at 158–59, 92 S.Ct. at 1929–30 (Marshall, J., dissenting) (stating that the officer "did not know if or when the informant had ever seen the gun"). In the case at bar, it is undisputed that the confidential reliable informant *did not* see the cocaine.

3 Although the state asserts that it received this tip from a known informant, the fact remains that the tip came from the unknown person. The known informant, on the other hand, merely served as a conduit through which the tip was transferred.

4 And even if the object's incriminating nature is immediately apparent, the plain-view doctrine alone cannot justify either a seizure or subsequent search of the item beyond that authorized by the original intrusion. *Hicks,* 480 U.S. at 325, 107 S.Ct. at 1152–53.

5 When asked whether he was carrying any weapons, G.M. replied that he did not have any weapons, but that he did have a pouch which he found in the street and that he did not know of its contents.

6 Because we conclude that the contraband's incriminating nature was not immediately apparent, we can dismiss the plain-view exception without considering the doctrine's third element: whether the police had lawful access to the contraband.

7 We likewise conclude that the plain-view doctrine did not provide a valid warrant exception for the subsequent search of the pouch. Although discovery of an item's incriminating nature through either plain view or plain touch may justify a warrantless seizure of the item, it alone does not justify an *additional* search of the item. *Dickerson,* 508 U.S. at 378–79, 113 S.Ct. at 2138–39. In *Dickerson,* the Supreme Court upheld this court's invalidation of a seizure of crack cocaine from the defendant's pocket on the grounds that the officer's manipulation of the bumps following a *Terry* pat-down search constituted a further search "not authorized by *Terry* or by any other exception to the warrant requirement." *Dickerson,* 508 U.S. at 379, 113 S.Ct. at 2139. Likewise, the Supreme Court invalidated a seizure of stereo equipment in plain view because the incriminating nature of the stereo equipment did not become immediately apparent until the police conducted a search beyond that authorized by the scope of their initial search. *Hicks,* 480 U.S. at 324–26, 107 S.Ct. at 1152–53.

In this case, the police were conducting a *Terry* stop and consequently were legitimately present at the scene when they viewed the pouch. The police may even have had probable cause to believe that the pouch *contained* contraband. But the fact remains that the police did not have a warrant to either seize or search the pouch. Even if the plain-view warrant exception would have allowed the police to seize the pouch, it alone did not allow them to further search the pouch.

8 Although it seems apparent from the record that the police officers on the scene did not think they had probable cause to arrest G.M., the analysis of whether the police actually had probable cause is an objective one. *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *White,* 489 N.W.2d at 794.

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113 S.Ct. 2130
Supreme Court of the United States

MINNESOTA, Petitioner,

v.

Timothy DICKERSON.

No. 91–2019.
|
Argued March 3, 1993.
|
Decided June 7, 1993.

Synopsis

Defendant's motion to suppress seizure of crack cocaine from defendant's person was denied by the District Court, Hennepin County, and defendant appealed. The Minnesota Court of Appeals, 469 N.W.2d 462, reversed. The State appealed. The Minnesota Supreme Court, 481 N.W.2d 840, affirmed. The State's petition for certiorari was granted. The Supreme Court, Justice White, held that: (1) police may seize nonthreatening contraband detected through the sense of touch during protective patdown search so long as the search stays within the bounds marked by *Terry*, and (2) search of defendant's jacket exceeded lawful bounds marked by *Terry* when officer determined that the lump was contraband only after squeezing, sliding and otherwise manipulating the contents of the defendant's pocket, which officer already knew contained no weapon.

Affirmed.

Justice Scalia filed a concurring opinion.

The Chief Justice filed an opinion concurring in part and dissenting in part, in which Justice Blackmun and Justice Thomas joined.

****2132** *Syllabus*[*]

Based upon respondent's seemingly evasive actions when approached by police officers and the fact that he had just left a building known for cocaine traffic, the officers decided to investigate further and ordered respondent to submit to a patdown search. The search revealed no weapons, but the officer conducting it testified that he felt a small lump in respondent's jacket pocket, believed it to be a lump of crack cocaine upon examining it with his fingers, and then reached into the pocket and retrieved a small bag of cocaine. The state trial court denied respondent's motion to suppress the cocaine, and he was found guilty of possession of a controlled substance. The Minnesota Court of Appeals reversed. In affirming, the State Supreme Court held that both the stop and the frisk of respondent were valid under *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, but found the seizure of the cocaine to be unconstitutional. Refusing to enlarge the "plain-view" exception to the Fourth Amendment's warrant requirement, the court appeared to adopt a categorical rule barring the seizure of any contraband detected by an officer through the sense of touch during a patdown search. The court further noted that, even if it recognized such a "plain-feel" exception, the search in this case would not qualify because it went far beyond what is permissible under *Terry.*

Held:

1. The police may seize nonthreatening contraband detected through the sense of touch during a protective patdown search of the sort permitted by *Terry,* so long as the search stays within the bounds marked by *Terry.* Pp. 2135–2138.

(a) *Terry* permits a brief stop of a person whose suspicious conduct leads an officer to conclude in light of his experience that criminal activity may be afoot, and a patdown search of the person for weapons when the officer is justified in believing that the person may be armed and presently dangerous. This protective search—permitted without a warrant and on the basis of reasonable suspicion less than probable cause—is not meant to discover evidence of crime, but must be strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others. If the protective search goes beyond what is necessary to determine if the suspect is armed, it ***367** is no longer valid under *Terry* and its fruits will be suppressed. *Sibron v. New York,* 392 U.S. 40, 65–66, 88 S.Ct. 1889, 1904, 20 L.Ed.2d 917. Pp. 2135–2136.

(b) In *Michigan v. Long,* 463 U.S. 1032, 1050, 103 S.Ct. 3469, 3481, 77 L.Ed.2d 1201 the seizure of contraband other than weapons during a lawful *Terry* search was justified by reference to the Court's cases under the "plain-view" doctrine. That doctrine—which permits police to seize an object without a warrant if they are lawfully in a position to view it, if its incriminating character is immediately apparent, and if they have a lawful right of access to it—has an

obvious application by analogy to cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search. Thus, if an 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. Cf., *e.g., Illinois v. Andreas,* 463 U.S. 765, 771, 103 S.Ct. 3319, 3324, 77 L.Ed.2d 1003. If the object is contraband, its warrantless seizure would be justified by the realization that resort to a neutral magistrate under such circumstances would be impracticable and would do little to promote the Fourth Amendment's objectives. Cf., *e.g.,* ****2133** *Arizona v. Hicks,* 480 U.S. 321, 326–327, 107 S.Ct. 1149, 1153–1154, 94 L.Ed.2d 347. Pp. 2135–2138.

2. Application of the foregoing principles to the facts of this case demonstrates that the officer who conducted the search was not acting within the lawful bounds marked by *Terry* at the time he gained probable cause to believe that the lump in respondent's jacket was contraband. Under the State Supreme Court's interpretation of the record, the officer never thought that the lump was a weapon, but did not immediately recognize it as cocaine. Rather, he determined that it was contraband only after he squeezed, slid, and otherwise manipulated the pocket's contents. While *Terry* entitled him to place his hands on respondent's jacket and to feel the lump in the pocket, his continued exploration of the pocket after he concluded that it contained no weapon was unrelated to the sole justification for the search under *Terry.* Because this further search was constitutionally invalid, the seizure of the cocaine that followed is likewise unconstitutional. Pp. 2138–2139.

481 N.W.2d 840, (Minn.1992) affirmed.

WHITE, J., delivered the opinion for a unanimous Court with respect to Parts I and II, and the opinion of the Court with respect to Parts III and IV, in which STEVENS, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined. SCALIA, J., filed a concurring opinion, *post*, p. ——. REHNQUIST, C.J., filed an opinion concurring in part and dissenting in part, in which BLACKMUN and THOMAS, JJ., joined, *post*, p. ——.

Attorneys and Law Firms

***368** Michael O. Freeman, Hennepin Co. Atty., Beverly J. Wolfe, Asst. Co. Atty., Minneapolis, MN, for petitioner.

Richard H. Seamon, Washington, DC, for the U.S., as amicus curiae by special leave of Court.

Peter W. Gorman, Minneapolis, MN, for respondent.

Opinion

Justice WHITE delivered the opinion of the Court.

In this case, we consider whether the Fourth Amendment permits the seizure of contraband detected through a police officer's sense of touch during a protective patdown search.

I

On the evening of November 9, 1989, two Minneapolis police officers were patrolling an area on the city's north side in a marked squad car. At about 8:15 p.m., one of the officers observed respondent leaving a 12–unit apartment building on Morgan Avenue North. The officer, having previously responded to complaints of drug sales in the building's hallways and having executed several search warrants on the premises, considered the building to be a notorious "crack house." According to testimony credited by the trial court, respondent began walking toward the police but, upon spotting ***369** the squad car and making eye contact with one of the officers, abruptly halted and began walking in the opposite direction. His suspicion aroused, this officer watched as respondent turned and entered an alley on the other side of the apartment building. Based upon respondent's seemingly evasive actions and the fact that he had just left a building known for cocaine traffic, the officers decided to stop respondent and investigate further.

The officers pulled their squad car into the alley and ordered respondent to stop and submit to a patdown search. The search revealed no weapons, but the officer conducting the search did take an interest in a small lump in respondent's nylon jacket. The officer later testified:

> "[A]s I pat-searched the front of his body, I felt a lump, a small lump, in the front pocket. I examined it with my fingers and it slid and it felt to be a lump of crack cocaine in cellophane." Tr. 9 (Feb. 20, 1990).

The officer then reached into respondent's pocket and retrieved a small plastic bag containing one fifth of one gram of crack cocaine. ****2134** Respondent was arrested and charged in Hennepin County District Court with possession of a controlled substance.

Before trial, respondent moved to suppress the cocaine. The trial court first concluded that the officers were justified under *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), in stopping respondent to investigate whether he might be engaged in criminal activity. The court further found that the officers were justified in frisking respondent to ensure that he was not carrying a weapon. Finally, analogizing to the "plain-view" doctrine, under which officers may make a warrantless seizure of contraband found in plain view during a lawful search for other items, the trial court ruled that the officers' seizure of the cocaine did not violate the Fourth Amendment:

> "To this Court there is no distinction as to which sensory perception the officer uses to conclude that the material ***370** is contraband. An experienced officer may rely upon his sense of smell in DWI stops or in recognizing the smell of burning marijuana in an automobile. The sound of a shotgun being racked would clearly support certain reactions by an officer. The sense of touch, grounded in experience and training, is as reliable as perceptions drawn from other senses. 'Plain feel,' therefore, is no different than plain view and will equally support the seizure here." App. to Pet. for Cert. C–5.

His suppression motion having failed, respondent proceeded to trial and was found guilty.

On appeal, the Minnesota Court of Appeals reversed. The court agreed with the trial court that the investigative stop and protective patdown search of respondent were lawful under *Terry* because the officers had a reasonable belief based on specific and articulable facts that respondent was engaged in criminal behavior and that he might be armed and dangerous. The court concluded, however, that the officers had overstepped the bounds allowed by *Terry* in seizing the cocaine. In doing so, the Court of Appeals "decline [d] to adopt the plain feel exception" to the warrant requirement. 469 N.W.2d 462, 466 (1991).

The Minnesota Supreme Court affirmed. Like the Court of Appeals, the State Supreme Court held that both the stop and the frisk of respondent were valid under *Terry,* but found the seizure of the cocaine to be unconstitutional. The court expressly refused "to extend the plain view doctrine to the sense of touch" on the grounds that "the sense of touch is inherently less immediate and less reliable than the sense of sight" and that "the sense of touch is far more intrusive into the personal privacy that is at the core of the [F]ourth [A]mendment." 481 N.W.2d 840, 845 (1992). The court thus appeared to adopt a categorical rule barring the seizure of any contraband detected by an officer through the sense of touch during a patdown search for weapons. The court further noted that "[e]ven if we recognized a 'plain feel' exception, ***371** the search in this case would not qualify" because "[t]he pat search of the defendant went far beyond what is permissible under *Terry.*" *Id.,* at 843, 844, n. 1. As the State Supreme Court read the record, the officer conducting the search ascertained that the lump in respondent's jacket was contraband only after probing and investigating what he certainly knew was not a weapon. See *id.,* at 844.

We granted certiorari, 506 U.S. 814, 113 S.Ct. 53, 121 L.Ed.2d 22 (1992), to resolve a conflict among the state and federal courts over whether contraband detected through the sense of touch during a patdown search may be admitted into evidence.[1] We ****2135** now affirm.[2]

***372** II

A

The Fourth Amendment, made applicable to the States by way of the Fourteenth Amendment, *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Time and again, this Court has observed that searches and seizures " 'conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.' " *Thompson v. Louisiana,* 469 U.S. 17, 19–20, 105 S.Ct. 409, 410, 83 L.Ed.2d 246 (1984) (*per curiam*) (quoting *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967) (footnotes omitted)); *Mincey v. Arizona,* 437 U.S. 385, 390, 98 S.Ct. 2408, 2412, 57 L.Ed.2d 290 (1978); see also *United States v. Place,* 462 U.S. 696, 701, 103 S.Ct. 2637, 2641, 77 L.Ed.2d 110 (1983). One such exception was ***373** recognized in *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), which held that "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot...," the officer may briefly stop the suspicious person and make "reasonable inquiries" aimed at confirming or dispelling his suspicions. *Id.,* 392 U.S., at 30,

88 S.Ct., at 1884; see also *Adams v. Williams,* 407 U.S. 143, 145–146, 92 S.Ct. 1921, 1922–1923, 32 L.Ed.2d 612 (1972).

****2136** *Terry* further held that "[w]hen 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 to others," the officer may conduct a patdown search "to determine whether the person is in fact carrying a weapon." 392 U.S., at 24, 88 S.Ct., at 1881. "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence...." *Adams, supra,* at 146, 92 S.Ct., at 1923. Rather, a protective search—permitted without a warrant and on the basis of reasonable suspicion less than probable cause—must be strictly "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." *Terry, supra,* at 26, 88 S.Ct., at 1882; see also *Michigan v. Long,* 463 U.S. 1032, 1049, and 1052, n. 16, 103 S.Ct. 3469, 3480–3481, and 3482, n. 16, 77 L.Ed.2d 1201 (1983); *Ybarra v. Illinois,* 444 U.S. 85, 93–94, 100 S.Ct. 338, 343–344, 62 L.Ed.2d 238 (1979). If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed. *Sibron v. New York,* 392 U.S. 40, 65–66, 88 S.Ct. 1889, 1904, 20 L.Ed.2d 917 (1968).

These principles were settled 25 years ago when, on the same day, the Court announced its decisions in *Terry* and *Sibron.* The question presented today is whether police officers may seize nonthreatening contraband detected during a protective patdown search of the sort permitted by *Terry.* We think the answer is clearly that they may, so long as the officers' search stays within the bounds marked by *Terry.*

***374** B

We have already held that police officers, at least under certain circumstances, may seize contraband detected during the lawful execution of a *Terry* search. In *Michigan v. Long, supra,* for example, police approached a man who had driven his car into a ditch and who appeared to be under the influence of some intoxicant. As the man moved to reenter the car from the roadside, police spotted a knife on the floorboard. The officers stopped the man, subjected him to a patdown search, and then inspected the interior of the vehicle for other weapons. During the search of the passenger compartment, the police discovered an open pouch containing marijuana and seized it. This Court upheld the validity of the search and seizure under *Terry.* The Court held first that, in the context of a roadside encounter, where police have reasonable suspicion based on specific and articulable facts to believe that a driver may be armed and dangerous, they may conduct a protective search for weapons not only of the driver's person but also of the passenger compartment of the automobile. 463 U.S., at 1049, 103 S.Ct., at 3480–3481. Of course, the protective search of the vehicle, being justified solely by the danger that weapons stored there could be used against the officers or bystanders, must be "limited to those areas in which a weapon may be placed or hidden." *Ibid.* The Court then held: "If, while conducting a legitimate *Terry* search of the interior of the automobile, the officer should, as here, discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances." *Id.,* at 1050, 103 S.Ct., at 3481; accord, *Sibron,* 392 U.S., at 69–70, 88 S.Ct., at 1905–1906 (WHITE, J., concurring); *id.,* at 79, 88 S.Ct., at 1910 (Harlan, J., concurring in result).

The Court in *Long* justified this latter holding by reference to our cases under the "plain-view" doctrine. See *Long, supra,* at 1050, 103 S.Ct., at 3481; see also *United States v. Hensley,* 469 U.S. 221, 235, 105 S.Ct. 675, 683–684, 83 L.Ed.2d 604 (1985) (upholding plain-view seizure in context ***375** of *Terry* stop). Under that doctrine, if police are lawfully in a position from which they view an object, if its incriminating character ****2137** is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant. See *Horton v. California,* 496 U.S. 128, 136–137, 110 S.Ct. 2301, 2307–2308, 110 L.Ed.2d 112 (1990); *Texas v. Brown,* 460 U.S. 730, 739, 103 S.Ct. 1535, 1541–1542, 75 L.Ed.2d 502 (1983) (plurality opinion). If, however, the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object—*i.e.,* if "its incriminating character [is not] 'immediately apparent,' " *Horton, supra,* 496 U.S., at 136, 110 S.Ct., at 2308—the plain-view doctrine cannot justify its seizure. *Arizona v. Hicks,* 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987).

We think that this 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. See *Illinois v. Andreas,* 463 U.S. 765, 771, 103 S.Ct. 3319, 3324, 77 L.Ed.2d 1003 (1983); *Texas v. Brown, supra,* at 740, 103 S.Ct., at 1542. 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. See *Hicks, supra,* at 326–327, 107 S.Ct., at 1153; *Coolidge v. New Hampshire,* 403 U.S. 443, 467–468, 469–470, 91 S.Ct. 2022, 2028–2029, 2040, 29 L.Ed.2d 564 (1971) (opinion of Stewart, J.). 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 ***376** would be justified by the same practical considerations that inhere in the plain-view context.[3]

The Minnesota Supreme Court rejected an analogy to the plain-view doctrine on two grounds: first, its belief that "the sense of touch is inherently less immediate and less reliable than the sense of sight," and second, that "the sense of touch is far more intrusive into the personal privacy that is at the core of the [F]ourth [A]mendment." 481 N.W.2d, at 845. We have a somewhat different view. First, *Terry* itself demonstrates that the sense of touch is capable of revealing the nature of an object with sufficient reliability to support a seizure. The very premise of *Terry,* after all, is that officers will be able to detect the presence of weapons through the sense of touch and *Terry* upheld precisely such a seizure. Even if it were true that the sense of touch is generally less reliable than the sense of sight, that only suggests that officers will less often be able to justify seizures of unseen contraband. Regardless 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.[4] The ***377** court's second concern—that touch is more intrusive into privacy than is ****2138** sight—is inapposite in light of the fact that the intrusion the court fears has already been authorized by the lawful search for weapons. The seizure of an item whose identity is already known occasions no further invasion of privacy. See *Soldal v. Cook County,* 506 U.S. 56, 66, 113 S.Ct. 538, ——, 121 L.Ed.2d 450 (1992); *Horton, supra,* at 141, 110 S.Ct., at 2310; *United States v. Jacobsen,* 466 U.S. 109, 120, 104 S.Ct. 1652, 1660, 80 L.Ed.2d 85 (1984). Accordingly, the suspect's privacy interests are not advanced by a categorical rule barring the seizure of contraband plainly detected through the sense of touch.

III

It remains to apply these principles to the facts of this case. Respondent has not challenged the finding made by the trial court and affirmed by both the Court of Appeals and the State Supreme Court that the police were justified under *Terry* in stopping him and frisking him for weapons. Thus, the dispositive question before this Court is whether the officer who conducted the search was acting within the lawful bounds marked by *Terry* at the time he gained probable cause to believe that the lump in respondent's jacket was contraband. The State District Court did not make precise findings on this point, instead finding simply that the officer, after feeling "a small, hard object wrapped in plastic" in respondent's pocket, "formed the opinion that the object ... was crack ... cocaine." App. to Pet. for Cert. C–2. The ***378** District Court also noted that the officer made "no claim that he suspected this object to be a weapon," *id.,* at C–5, a finding affirmed on appeal, see 469 N.W.2d, at 464 (the officer "never thought the lump was a weapon"). The Minnesota Supreme Court, after "a close examination of the record," held that the officer's own testimony "belies any notion that he 'immediately' " recognized the lump as crack cocaine. See 481 N.W.2d, at 844. Rather, the court concluded, the officer determined that the lump was contraband only after "squeezing, sliding and otherwise manipulating the contents of the defendant's pocket"—a pocket which the officer already knew contained no weapon. *Ibid.*

Under the State Supreme Court's interpretation of the record before it, it is clear that the court was correct in holding that the police officer in this case overstepped the bounds of the "strictly circumscribed" search for weapons allowed under *Terry.* See *Terry,* 392 U.S., at 26, 88 S.Ct., at 1882. Where, as here, "an officer who is executing a valid search for one item seizes a different item," this Court rightly "has been sensitive to the danger ... that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will." *Texas v. Brown,* 460 U.S., at 748, 103 S.Ct., at 1546–1547 (STEVENS, J., concurring in judgment). Here, the officer's continued exploration of respondent's pocket after having concluded that it contained no ****2139** weapon

was unrelated to "[t]he sole justification of the search [under *Terry:*] ... the protection of the police officer and others nearby." 392 U.S., at 29, 88 S.Ct., at 1884. It therefore amounted to the sort of evidentiary search that *Terry* expressly refused to authorize, see *id.,* at 26, 88 S.Ct., at 1882, and that we have condemned in subsequent cases. See *Michigan v. Long,* 463 U.S., at 1049, n. 14, 103 S.Ct., at 3480–3481; *Sibron,* 392 U.S., at 65–66, 88 S.Ct., at 1904.

Once again, the analogy to the plain-view doctrine is apt. In *Arizona v. Hicks,* 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987), this Court held invalid the seizure of stolen stereo equipment found by police while executing a valid search for other evidence. Although ***379** the police were lawfully on the premises, they obtained probable cause to believe that the stereo equipment was contraband only after moving the equipment to permit officers to read its serial numbers. The subsequent seizure of the equipment could not be justified by the plain-view doctrine, this Court explained, because the incriminating character of the stereo equipment was not immediately apparent; rather, probable cause to believe that the equipment was stolen arose only as a result of a further search—the moving of the equipment—that was not authorized by a search warrant or by any exception to the warrant requirement. The facts of this case are very similar. Although the officer was lawfully in a position to feel the lump in respondent's pocket, because *Terry* entitled him to place his hands upon respondent's jacket, the court below determined that the incriminating character of the object was not immediately apparent to him. Rather, the officer determined that the item was contraband only after conducting a further search, one not authorized by *Terry* or by any other exception to the warrant requirement. Because this further search of respondent's pocket was constitutionally invalid, the seizure of the cocaine that followed is likewise unconstitutional. *Horton,* 496 U.S., at 140, 110 S.Ct., at 2309–2310.

IV

For these reasons, the judgment of the Minnesota Supreme Court is

Affirmed.

Justice SCALIA, concurring.

I take it to be a fundamental principle of constitutional adjudication that the terms in the Constitution must be given the meaning ascribed to them at the time of their ratification. Thus, when the Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable searches and seizures,* shall not be violated" (emphasis added), it "is ***380** to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted," *Carroll v. United States,* 267 U.S. 132, 149, 45 S.Ct. 280, 284, 69 L.Ed. 543 (1925); see also *California v. Acevedo,* 500 U.S. 565, 583–584, 111 S.Ct., at 1982, 1993, 114 L.Ed.2d 619 (1991) (SCALIA, J., concurring in judgment). The purpose of the provision, in other words, is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted—even if a later, less virtuous age should become accustomed to considering all sorts of intrusion "reasonable."

My problem with the present case is that I am not entirely sure that the physical search—the "frisk"—that produced the evidence at issue here complied with that constitutional standard. The decision of ours that gave approval to such searches, *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), made no serious attempt to determine compliance with traditional standards, but rather, according to the style of this Court at the time, simply adjudged that such a search was "reasonable" by current estimations. *Id.,* at 22–27, 88 S.Ct., at 1880–1883.

****2140** There is good evidence, I think, that the "stop" portion of the *Terry* "stop-and-frisk" holding accords with the common law—that it had long been considered reasonable to detain suspicious persons for the purpose of demanding that they give an account of themselves. This is suggested, in particular, by the so-called night-walker statutes, and their common-law antecedents. See Statute of Winchester, 13 Edw. I, Stat. 2, ch. 4 (1285); Statute of 5 Edw. III, ch. 14 (1331); 2 W. Hawkins, Pleas of the Crown ch. 13, § 6, p. 129 (8th ed. 1824) ("It is holden that this statute was made in affirmance of the common law, and that every private person may by the common law arrest any suspicious night-walker, and detain him till he give a good account of himself"); 1 E. East, Pleas of the Crown ch. 5, § 70, p. 303 (1803) ("It is said ... that every private person may by the common law arrest any suspicious night-walker, and detain him till he give a good account of himself"); see also M. Dalton, The Country ***381** Justice ch. 104, pp. 352–353 (1727); A. Costello, Our Police Protectors: History of the New York Police 25 (1885) (citing 1681 New

York City regulation); 2 Perpetual Laws of Massachusetts 1788–1798, ch. 82, § 2, p. 410 (1797 Massachusetts statute).

I am unaware, however, of any precedent for a physical search of a person thus temporarily detained for questioning. Sometimes, of course, the temporary detention of a suspicious character would be elevated to a full custodial arrest on probable cause—as, for instance, when a suspect was unable to provide a sufficient accounting of himself. At *that* point, it is clear that the common law would permit not just a protective "frisk," but a full physical search incident to the arrest. When, however, the detention did not rise to the level of a full-blown arrest (and was not supported by the degree of cause needful for that purpose), there appears to be no clear support at common law for physically searching the suspect. See Warner, The Uniform Arrest Act, 28 Va.L.Rev. 315, 324 (1942) ("At common law, if a watchman came upon a suspiciously acting nightwalker, he might arrest him and then search him for weapons, but he had no right to search before arrest"); Williams, Police Detention and Arrest Privileges—England, 51 J.Crim.L., C. & P.S. 413, 418 (1960) ("Where a suspected criminal is also suspected of being offensively armed, can the police search him for arms, by tapping his pockets, before making up their minds whether to arrest him? There is no English authority...").

I frankly doubt, moreover, whether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous, to such indignity—which is described as follows in a police manual:

> "Check the subject's neck and collar. A check should be made under the subject's arm. Next a check should be made of the upper back. The lower back should also be checked.
>
> ***382** "A check should be made of the upper part of the man's chest and the lower region around the stomach. The belt, a favorite concealment spot, should be checked. The inside thigh and crotch area also should be searched. The legs should be checked for possible weapons. The last items to be checked are the shoes and cuffs of the subject." J. Moynahan, Police Searching Procedures 7 (1963) (citations omitted).

On the other hand, even if a "frisk" prior to arrest would have been considered impermissible in 1791, perhaps it was considered permissible by 1868, when the Fourteenth Amendment (the basis for applying the Fourth Amendment to the States) was adopted. Or perhaps it is only since that time that concealed weapons capable of harming the interrogator quickly and from beyond arm's reach have become common —which might alter the judgment of what is "reasonable" under the original standard. But technological changes were no more discussed ****2141** in *Terry* than was the original state of the law.

If I were of the view that *Terry* was (insofar as the power to "frisk" is concerned) incorrectly decided, I might—even if I felt bound to adhere to that case—vote to exclude the evidence incidentally discovered, on the theory that half a constitutional guarantee is better than none. I might also vote to exclude it if I agreed with the original-meaning-is-irrelevant, good-policy-is-constitutional-law school of jurisprudence that the *Terry* opinion represents. As a policy matter, it may be desirable to *permit* "frisks" for weapons, but not to *encourage* "frisks" for drugs by admitting evidence other than weapons.

I adhere to original meaning, however. And though I do not favor the mode of analysis in *Terry,* I cannot say that its result was wrong. Constitutionality of the "frisk" in the present case was neither challenged nor argued. Assuming, therefore, that the search was lawful, I agree with the Court's premise that any evidence incidentally discovered in ***383** the course of it would be admissible, and join the Court's opinion in its entirety.

Chief Justice REHNQUIST, with whom Justice BLACKMUN and Justice THOMAS join, concurring in part and dissenting in part.

I join Parts I and II of the Court's opinion. Unlike the Court, however, I would vacate the judgment of the Supreme Court of Minnesota and remand the case to that court for further proceedings.

The Court, correctly in my view, states that "the dispositive question before this Court is whether the officer who conducted the search was acting within the lawful bounds marked by *Terry* [*v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968),] at the time he gained probable cause to believe that the lump in respondent's jacket was contraband." *Ante,* at 2138. The Court then goes on to point out that the state trial court did not make precise findings on this point, but accepts the appellate findings made by the Supreme Court of Minnesota. I believe that these findings, like those of the trial court, are imprecise and not directed expressly to the question of the officer's probable cause to believe that the lump was contraband. Because the Supreme Court of

Minnesota employed a Fourth Amendment analysis which differs significantly from that now adopted by this Court, I would vacate its judgment and remand the case for further proceedings there in the light of this Court's opinion.

All Citations

508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334, 61 USLW 4544

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Most state and federal courts have recognized a so-called "plain-feel" or "plain-touch" corollary to the plain-view doctrine. See *United States v. Coleman,* 969 F.2d 126, 132 (CA5 1992); *United States v. Salazar,* 945 F.2d 47, 51 (CA2 1991), cert. denied, 504 U.S. 923, 112 S.Ct. 1975, 118 L.Ed.2d 574 (1992); *United States v. Buchannon,* 878 F.2d 1065, 1067 (CA8 1989); *United States v. Williams,* 262 U.S.App.D.C. 112, 119–124, 822 F.2d 1174, 1181–1186 (1987); *United States v. Norman,* 701 F.2d 295, 297 (CA4), cert. denied, 464 U.S. 820, 104 S.Ct. 82, 78 L.Ed.2d 92 (1983); *People v. Chavers,* 33 Cal.3d 462, 471–473, 658 P.2d 96, 102–104 (1983); *Dickerson v. State,* No. 228, 1993 WL 22025, *2, 1993 Del.LEXIS 12, *3–*4 (Jan. 26, 1993); *State v. Guy,* 172 Wis.2d 86, 101–102, 492 N.W.2d 311, 317–318 (1992). Some state courts, however, like the Minnesota court in this case, have rejected such a corollary. See *People v. Diaz,* 81 N.Y.2d 106, 595 N.Y.S.2d 940, 612 N.E.2d 298 (1993); *State v. Collins,* 139 Ariz. 434, 435–438, 679 P.2d 80, 81–84 (Ct.App.1983); *People v. McCarty,* 11 Ill.App.3d 421, 422, 296 N.E.2d 862, 863 (1973); *State v. Rhodes,* 788 P.2d 1380, 1381 (Okla.Crim.App.1990); *State v. Broadnax,* 98 Wash.2d 289, 296–301, 654 P.2d 96, 101–103 (1982); cf. *Commonwealth v. Marconi,* 408 Pa.Super. 601, 611–615, and n. 17, 597 A.2d 616, 621–623, and n. 17 (1991), appeal denied, 531 Pa. 638, 611 A.2d 711 (1992).

2 Before reaching the merits of the Fourth Amendment issue, we must address respondent's contention that the case is moot. After respondent was found guilty of the drug possession charge, the trial court sentenced respondent under a diversionary sentencing statute to a 2–year period of probation. As allowed by the diversionary scheme, no judgment of conviction was entered and, upon respondent's successful completion of probation, the original charges were dismissed. See Minn.Stat. § 152.18 (1992). Respondent argues that the case has been rendered moot by the dismissal of the original criminal charges. We often have observed, however, that "the possibility of a criminal defendant's suffering 'collateral legal consequences' from a sentence already served" precludes a finding of mootness. *Pennsylvania v. Mimms,* 434 U.S. 106, 108, n. 3, 98 S.Ct. 330, 332, n. 3, 54 L.Ed.2d 331 (1977) (*per curiam*); see also *Evitts v. Lucey,* 469 U.S. 387, 391, n. 4, 105 S.Ct. 830, 833, n. 4, 83 L.Ed.2d 821 (1985); *Sibron v. New York,* 392 U.S. 40, 53–58, 88 S.Ct. 1889, 1897–1900, 20 L.Ed.2d 917 (1968). In this case, Minnesota law provides that the proceeding which culminated in finding respondent guilty "shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime or for any other purpose." Minn.Stat. § 152.18 (1992). The statute also provides, however, that a nonpublic record of the charges dismissed pursuant to the statute "shall be retained by the department of public safety for the purpose of use by the courts in determining the merits of subsequent proceedings" against the respondent. *Ibid.* Construing this provision, the Minnesota Supreme Court has held that "[t]he statute contemplates use of the record should [a] defendant have 'future difficulties with the law.' " *State v. Goodrich,* 256 N.W.2d 506, 512 (1977). Moreover, the Court of Appeals for the Eighth Circuit has held that a diversionary disposition under § 152.18 may be included in calculating a defendant's criminal history category in the event of a subsequent federal conviction. *United States v. Frank,* 932 F.2d 700, 701 (1991). Thus, we must conclude that reinstatement of the record of the charges against respondent would carry collateral legal consequences and that, therefore, a live controversy remains.

3 "[T]he police officer in each [case would have] had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification ... and permits the warrantless seizure." *Coolidge v. New Hampshire,* 403 U.S. 443, 466, 91 S.Ct. 2022, 2038, 29 L.Ed.2d 564 (1971) (opinion of Stewart, J.).

4 We also note that this Court's opinion in *Ybarra v. Illinois,* 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979), appeared to contemplate the possibility that police officers could obtain probable cause justifying a seizure of contraband through the

sense of touch. In that case, police officers had entered a tavern and subjected its patrons to patdown searches. While patting down the petitioner Ybarra, an "officer felt what he described as 'a cigarette pack with objects in it,' " seized it, and discovered heroin inside. *Id.,* at 88–89, 100 S.Ct., at 340–342. The State argued that the seizure was constitutional on the grounds that the officer obtained probable cause to believe that Ybarra was carrying contraband during the course of a lawful *Terry* frisk. *Ybarra, supra,* at 92, 100 S.Ct., at 342–343. This Court rejected that argument on the grounds that "[t]he initial frisk of Ybarra was simply not supported by a reasonable belief that he was armed and presently dangerous," as required by *Terry.* 444 U.S., at 92–93, 100 S.Ct., at 343. The Court added: "[s]ince we conclude that the initial patdown of Ybarra was not justified under the Fourth and Fourteenth Amendments, we need not decide whether or not the presence on Ybarra's person of 'a cigarette pack with objects in it' yielded probable cause to believe that Ybarra was carrying any illegal substance." *Id.,* at 93, n. 5, 100 S.Ct., at 343, n. 5. The Court's analysis does not suggest, and indeed seems inconsistent with, the existence of a categorical bar against seizures of contraband detected manually during a *Terry* patdown search.

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406 So.2d 1273
District Court of Appeal of Florida, First District.

Lawrence R. RAETTIG, Appellant,

v.

STATE of Florida, Appellee.

No. VV-453.
|
Dec. 9, 1981.

Synopsis

Defendant was convicted in the Circuit Court, Suwannee County, John W. Peach, J., of drug charges and he appealed. The District Court of Appeal, Ervin, J., held that: (1) stop and detention of vehicle for agricultural inspection was permissible; (2) when deputy sheriff was unable to obtain search warrant for vehicle, there was no legitimate reason for continuing the detention; and (3) search of contents of camper could not be justified under the open view doctrine.

Reversed and remanded.

Attorneys and Law Firms

***1274** J. Victor Africano, Live Oak, for appellant.

Jim Smith, Atty. Gen., and Miguel A. Olivella, Jr., Asst. Atty. Gen., for appellee.

Opinion

ERVIN, Judge.

Raettig pled nolo contendere to two drug related charges, reserving on appeal his contention that the trial court erred in denying his motion to suppress contraband seized from a camper-truck after he had stopped it at an agricultural inspection station. For the following reasons, we agree with Raettig that the motion to suppress should have been granted, and accordingly vacate the judgments and sentences and remand the case for further proceedings consistent with this opinion.

On August 10, 1979, at approximately 1:00 a. m., Raettig stopped his 1979 Dodge pick-up truck, with an attached camper shell, at an inspection station. An agricultural inspector then asked the appellant for permission to inspect the camper portion of the truck. Raettig testified at the suppression hearing that he attempted to locate the key to the camper, but was unable to find it and so advised the inspector. Raettig told the inspector that the truck belonged to his brother. The inspector, becoming suspicious of the appellant's manner, summoned Deputy Sheriff Richard Tucker to the scene. Tucker spoke with the inspector and was advised of the circumstances surrounding Raettig's detention. Tucker asked the defendant for permission to open the camper top but appellant again explained that he did not have the key and further refused to give the deputy consent to forcibly enter his vehicle. Upon that refusal, Tucker approached the truck and made a cursory search of it from the outside. He attempted to look through the windows of the camper but was unable to see anything inside them because they had been painted. He was, however, able to observe through the window of the cab an ordinary road map which appeared to him to have red marks depicting the locations of the inspection stations in Suwannee County. Tucker then directed the appellant to drive his vehicle to the Suwannee County jail some 15 miles from the inspection station.

Although there is some uncertainty in the record, the agricultural inspector apparently accompanied the deputy and the appellant back to the jail to serve as an affiant for a search warrant to search the appellant's vehicle. Upon their arrival at the jail, Deputy Tucker was advised by an assistant state attorney that he could not search defendant's vehicle without a search warrant and that the deputy did not have probable cause to search Raettig's vehicle at that time. Nevertheless, Deputy Tucker, while appellant was still being detained at the jailhouse, went outside and, with his flashlight, began another search of defendant's vehicle from the outside. He observed at the rear of the truck a crack between the bed of the truck and the base of the camper top which was six to eight inches long and about one-half inch wide. In a kneeling position, and with the aid of the flashlight, he was able to observe through the small opening some plastic bags and to detect what appeared to him to be marijuana inside the bags. He then crawled underneath the truck and found a seed which he was then unable to identify with certainty, but which was later determined to be of marijuana origin.

Based upon these observations, the deputy obtained a search warrant, and, pursuant to the warrant, broke into the camper top ***1275** and found eight plastic bags containing 168 pounds of marijuana and a yellow one gallon plastic jug containing hashish. Upon these facts, the trial court denied the motion to suppress.

The state argues that the trial court's denial of the motion to suppress can be justified on either of two theories: (1) stop and frisk, (2) plain view or open view.

I. Stop and Frisk

We premise our discussion of the subject with the observations that the agricultural inspector clearly had the authority pursuant to Section 570.15(1) (a), Florida Statutes (1979), to stop Raettig's truck. See Sharpe v. State, 370 So.2d 42 (Fla. 1st DCA 1979); Stephenson v. Dept. of Agriculture & Consumer Services, 329 So.2d 373 (Fla. 1st DCA 1976), aff'd. 342 So.2d 60 (Fla.1976). Moreover, the unique type of administrative detention involved here would permit the inspector to detain appellant for a longer period of time than merely to ask a few preliminary questions. Sharpe v. State, supra, at 44. And, although Deputy Tucker was not an authorized officer pursuant to Section 570.15, his participation in the detention as a deputy sheriff would not invalidate the appellant's detention. See Gryzik v. State, 380 So.2d 1102 (Fla. 1st DCA 1980). Cf. Section 570.15(3). Finally, because Sections 570.15(1)(b) and 570.15(1)(a) 6 give the agricultural inspector a right to apply for a search warrant to search a stopped truck, it was not improper for Deputy Tucker to require appellant to bring his truck to the county jail for the purpose of conducting a more thorough inspection there. Cf. Miller v. State, 368 So.2d 943 (Fla. 1st DCA 1979). Once, however, the deputy was unable to obtain a search warrant at the jail, any colorable administrative justification for Raettig's detention necessarily ceased. A search conducted pursuant to an agricultural inspection detention cannot be conducted without compliance with the same probable cause standards applicable to criminal cases. Pederson v. State, 373 So.2d 367, 369 (Fla. 1st DCA 1979), cert. den., 383 So.2d 1203 (Fla.1980); Stephenson v. Dept. of Agriculture & Consumer Services, supra. Raettig, then, should have been free to leave the jail after Deputy Tucker was advised he had no probable cause to obtain a warrant.

The state, however, attempts to justify the deputy's further detainment of appellant by relying on Section 901.151, Florida's stop and frisk statute. Although such limited searches are authorized upon an officer's founded suspicion, not tantamount to probable cause that a crime either is being committed or was committed, that lesser standard does not give the officer carte blanche authority to conduct a frisk which is unlimited in duration. Detentions for such purposes have traditionally been of only transient length. For example, a 30-40-minute stop of a motorist suspected of transporting drugs was held to be of excessive duration and not to qualify under the theory of stop and frisk as an exception to the Fourth Amendment requirement that detentions be reasonable. See Sharpe v. United States, 660 F.2d 967 (4th Cir. 1981).

Finally, reasons often given for authorizing investigatory stops have no applicability to Deputy Tucker's further detention of appellant at the jail. He had already preserved the status quo, cf. State v. Martinez, 376 So.2d 931 (Fla. 4th DCA 1979), by securing appellant inside the jail. He had already taken a cursory view of appellant's truck at the inspection station. His safety was not threatened at the jailhouse, and it cannot be seriously suggested that the search of the truck outside the jail was necessitated by the purpose of finding weapons. Cf. M.A.P. v. State, 403 So.2d 1384 (Fla. 2d DCA 1981).

We conclude that there is no conceivable theory upon which the detention below was legally justified, consequently any resulting frisk, whose purpose pursuant to Section 901.151 is restricted to a limited search for weapons, was similarly invalid.

II. Plain View or Open View

We next address the state's alternative contention that the order denying the motion to suppress can be sustained because the contraband was within the open or plain ***1276** view of Deputy Tucker. The state places great reliance on Albo v. State, 379 So.2d 648 (Fla.1980), in which the court justified, under plain view, an inadvertent observation of 35-40 bales of marijuana made by a police officer with the aid of a flashlight inside a motor home after he had legally entered it for the purpose of checking its identification number. The state's reliance on Albo is, however, misplaced. In Albo, the officer had made a prior valid intrusion into the motor home before he observed the contraband. The facts in the instant case disclose no prior intrusion, therefore plain view is inapplicable.

If the seizure of the contraband by Deputy Tucker can be upheld on any basis, it can rest only upon the theory of open view-a theory that applies to two discrete factual situations: (1) where both the officer and the contraband are positioned in a non-constitutionally protected area, so that any

resulting seizure is not subjected to any Fourth Amendment strictures, and (2) where the officer is himself located outside of a constitutionally protected area and observes contraband within a protected area, he is then furnished probable cause to seize the item. See Ensor v. State, 403 So.2d 349 (Fla.1981).

From a superficial standpoint it could be argued that the seizure must be sustained under the second category of open view since Deputy Tucker saw the contraband while standing outside the camper-truck. Yet, the existence of such facts does not necessarily mean that our inquiry is now concluded. Being reminded that "the Fourth Amendment protects people, not places ...", Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967), the focus of our inquiry should be narrowed to resolving the question of whether it can be said that Raettig exhibited a reasonable expectation of privacy in the contents that were seen within the camper. This inquiry involves the application of Katz's two-fold test: (1) Did the possessor manifest an actual subjective expectation of privacy to personal effects within an area, and, if so, (2) was his expectation one that society is prepared to recognize as reasonable?[1] Katz v. United States, supra, 389 U.S. at 361, 88 S.Ct. at 516 (1967) (Harlan, J., concurring).

Although Katz applied the test to invalidate the admissibility of evidence seized within a structure, it is clear that its rule may also be applied to protect the possessor's rights of privacy to contents seized from a vehicle. Admittedly, his rights of privacy in a vehicle do not rise to the same level as those in his home or apartment,[2] see United States v. Chadwick, 433 U.S. 1, 12-13, 97 S.Ct. 2476, 2484-2485, 53 L.Ed.2d 538 (1977); United States v. Martinez-Fuerte, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976); Cardwell v. Lewis, 417 U.S. 583, 590, 94 S.Ct. 2464, 2469, 41 L.Ed.2d 325 (1974) (plurality opinion); Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), nevertheless "(a) search even of an automobile, is a substantial invasion of privacy. To protect that privacy from official arbitrariness, the Court always has regarded probable cause as the minimum requirement for a lawful search." United States v. Ortiz, 422 U.S. 891, 894, 896, 95 S.Ct. 2585, 2587, 2588, 45 L.Ed.2d 623 (1975) (footnotes omitted).

Because then the Katz rule may apply, under appropriate circumstances, to invalidate ***1277** the seizure of items within a vehicle that were visible outside the vehicle, we must first determine whether Raettig manifested an actual, subjective expectation that the property within the camper would remain free from public scrutiny. Once again, some broad principles from Katz are helpful: a person cannot be said to have exhibited an actual expectation of privacy if he "knowingly exposes (articles) to the public, even in his own home, or office ...." 389 U.S. at 351, 88 S.Ct. at 511. On the other hand, "what (a person) seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Id.

In the instant case, the record shows that Raettig took deliberate steps to conceal his personal effects inside the camper from public view: the windows of the camper had been painted over, thereby concealing its contents; its doors had been locked, and Raettig had refused access to the officers.

In the final analysis, whether a person may be said to have exhibited a subjective expectation of privacy in his possessions depends upon the totality of all the efforts he takes to secure his property from public view. Cf. Norman v. State, supra. Considering all the overt steps Raettig undertook, we do not consider that his failure to seal off an aperture eight inches in length and ½ inch in width between the bed of the truck and the camper shell necessarily leads to the conclusion that he thereby knowingly exposed his property to public view. This belief follows the thesis advanced by Professor Lafave in his exhaustive study, Search and Seizure, A Treatise On the Fourth Amendment, s 2.2(b) (1978). Lafave approves the general rule recognizing that the use of a flashlight as an aid in illuminating objects which would otherwise be in open view does not amount to a search. He considers the rule is applicable in situations where a flashlight is directed at an intentionally open or transparent space. However, he suggests that not all flashlight observations are deserving of a plain or open view characterization. Utilizing an analysis based on Katz, he comments:

> (S)urely there comes a point where it can be said that a person has "justifiably relied" upon the privacy of his premises even though he has not taken the extraordinary step of sealing off every minute aperture in that structure. Precisely when that point is reached is a matter upon which reasonable minds might differ. But in making that judgment in a particular case, it certainly is not irrelevant that the officer was able to pierce the privacy-by-darkness inside the premises only by directing an artificial light into the building. It is one thing to say that "(t)he plain view rule does not go into hibernation at sunset," so that a person cannot claim a justified expectation of privacy based upon nothing more than the fact that what could be seen during the day can be seen during the nighttime only by artificial

> light. It is quite another, however, to conclude that when a person, in effect, "creates" darkness within premises by the manner in which he closes and secures the building, there can never be a constitutionally-protected expectation that this privacy will not be breached by artificial illumination manipulated from outside.

Lafave, supra, s 2.2(b), pages 253-254 (footnotes omitted).

We find this analysis convincing. One can readily consider that a person has knowingly exposed his personal effects to public view if those objects are easily visible outside the area through, for example, an open door or a transparent window. Given such circumstances, an officer would be furnished probable cause to seize contraband or other incriminating evidence within the area. And his pre-intrusive view would not be considered a search. See Ensor v. State, supra; Tyler v. United States, 302 A.2d 748 (D.C.App.1973); People v. Whalen, 390 Mich. 672, 213 N.W.2d 116 (1973); People v. Wheeler, 28 Cal.App.3d 1065, 105 Cal.Rptr. 56 (1972); State v. Ashby, 245 So.2d 225 (1971). Therefore, if personal effects are openly exposed, it should make no difference ***1278** whether illumination is used as a means of aiding the officer's identification of the contents within the area.

When, however, a possessor such as Raettig has taken affirmative measures to safeguard his property within an area from public view, a minute crack on the surface of such area can hardly be regarded as an implied invitation to any curious passerby to take a look.[3] Cf. Berryhill v. State, 372 So.2d 355 (Ala.Civ.App.1979). On the record before us, we conclude that Raettig must be considered to have exhibited an actual expectation of privacy in the contents of his camper.

Can it be said, however, that his expectation is one that society is prepared to recognize as reasonable? This question must also be answered affirmatively. In addition to all the actions Raettig took to conceal his property from public view, he was in lawful possession of the camper-truck, having driven it with the permission of his brother. "One who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." Rakas v. Illinois, 439 U.S. 128, 144, n. 12, 99 S.Ct. 421, 431, n. 12, 58 L.Ed.2d 387 (1978) (quoted with approval by the Florida Supreme Court in Norman v. State, supra, at 647). Clearly, then, Raettig must be said to have a "cognizable property right in the invaded area." Norman v. State, supra, at 647.

The judgments and sentences are reversed, as is the lower court's order denying the motion to suppress, and the cause is remanded for such further proceedings as are consistent with this opinion.

LILES, WOODIE A. (Retired) and PEARSON, TILLMAN (Retired), Associate Judges, concur.

All Citations

406 So.2d 1273

Footnotes

1 This two-fold test has been specifically followed by the Florida Supreme Court in two recent cases. See Norman v. State, 379 So.2d 643 (Fla.1980); State v. Brady, 406 So.2d 1093, no. 59,054 (Fla., October 15, 1981) (1981 FLW 610).

2 Although, as noted, Section 570.15, Florida Statutes (1979), has been construed as requiring the same probable cause standard applicable to searches in criminal cases, Pederson v. State, supra, there would appear to be no constitutional inhibition to the legislature amending the statute to provide for less exacting standards. See Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). In fact, the legislature took such action in a special 1979 session, by amending Section 570.15(1)(b) and in effect, overruling Pederson. See Ch. 79-587, s 1, Laws of Fla. That amendment, however, is not applicable here as its effective date was December 17, 1979.

3 Superficially the facts in the instant case can be said to be very similar to those in United States v. Wright, 449 F.2d 1355 (D.C. Cir. 1971), in which the seizure of evidence from a garage was sustained on a record revealing that an investigating officer had seen, with the aid of a flashlight, stolen items through a locked, but partially opened, door to the garage. Yet, there were other facts-not present here-which gave the officer the right to take "(a) closer look at a challenging situation ...." 449 F.2d at 1357. Before the garage view occurred, the officer had seen "tell-tale sweepings of nuts and bolts" in front of the garage in an area near where an automobile earlier had been stripped of its various parts.

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378 So.2d 72
District Court of Appeal of Florida, Third District.

The STATE of Florida, Appellant,

v.

Arnold ADAMS and Linda Harris, Appellees.

No. 78-2138.
|
Dec. 18, 1979.

Synopsis

In prosecution for possession of marijuana, the Circuit Court, Dade County, Wilkie D. Ferguson, Jr., J., entered order suppressing evidence, and State appealed. The District Court of Appeal, Schwartz, J., held that: (1) no error occurred in suppressing marijuana seen by police officer upon standing on chair and peering in window, where marijuana was not in "plain view," as defendants entertained reasonable expectation of privacy that officer would not enter their porch area, climb up on piece of furniture and look down from window into their apartment, and there were no exigent circumstances demonstrated which would otherwise obviate constitutional requirement that officers first procure search warrant, and (2) where police knocked on defendants' door only after and because officer had seen cannabis upon standing on chair and peering in window, the sighting of cannabis through open door was direct product and exploitation of illegal window view, and thus any evidence seized as result was required to be suppressed as "fruit of the poisonous tree."

Affirmed.

Attorneys and Law Firms

***73** Janet Reno, State's Atty. and Theda R. James, Asst. State's Atty., for appellant.

Bennett H. Brummer, Public Defender and Robert R. Schrank, Asst. Public Defender, for appellees.

Before HENDRY and SCHWARTZ, JJ., and CHAPPELL, BILL G., Associate Judge.

Opinion

SCHWARTZ, Judge.

The state appeals from the following order suppressing evidence:

> 1. That this Court specifically finds that the Defendants, ARNOLD ADAMS and LINDA HARRIS, were arrested on June 12, 1978, and charged with violation of Statute 893.12(1)(e), possession of marijuana. Acting upon the information supplied by an informant, Miami Police Officers Allagood and Cox proceeded to a rooming house where the Defendants were said to be residing and in possession of marijuana. Upon arrival, Officer Allagood went to the Defendants' apartment, but since he could not see through the window, which was above his eye level Officer Allagood stepped up onto the porch, stood on a chair, and peered in, observing the Defendants sitting in a room which contained marijuana. The Officers did testify at the deposition that the arrest area was 'secured' before the Officers entered the apartment, and that there was no back door to the apartment and further, that the Officers could have detained any person leaving the apartment prior to arrest. The Officers knocked at the door whereupon the door was opened and the Officers observed marijuana,[1] at which time they entered the Defendants' dwelling, arrested the Defendants and seized the contraband. The Officers at no time attempted to procure a search warrant.
>
> ***74** 2. This Court specifically holds that the contraband seized was not in 'plain view'. Furthermore, the Defendants entertained a reasonable expectation of privacy that Police Officers would not enter their porch area, climb up on a piece of furniture and look down from a window into their apartment. Hornblower v. State, 351 So.2d 716 (Fla.1977); Olivera v. State, 315 So.2d 487 (2 DCA 1975).
>
> 3. That furthermore, this Court specifically holds that there were no exigent circumstances demonstrated which would otherwise obviate the constitutional requirement that the Officers first procure a search warrant. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); Hornblower v. State, supra.
>
> That the Court therefore, based upon the above authorities cited herein, suppresses the marijuana

illegally seized by the Police from the Defendants' rooming house on June 12, 1978.

In this order, the trial court ably and correctly resolved the issues in controversy. Its treatment of the applicable law is supported, in addition to the authorities cited, by the comprehensive opinion in Morsman v. State, 360 So.2d 137 (Fla.2d DCA 1978). See also Hunter v. State, 375 So.2d 1152 (Fla.2d DCA 1979); State v. Oliver, 368 So.2d 1331, 1335 (Fla.3d DCA 1979); cf. State of Texas v. Gonzales, 388 F.2d 145 (5th Cir. 1968); Brock v. United States, 223 F.2d 681, 685 (5th Cir. 1955).

On the basis therefore of the findings and reasoning contained in the order under review, it is

Affirmed.

All Citations

378 So.2d 72

Footnotes

1 In this court, the state, citing Menendez v. State, 368 So.2d 1278 (Fla.1979); State v. Ashby, 245 So.2d 225 (Fla.1971); Winchell v. State, 362 So.2d 992 (Fla.3d DCA 1978), cert. denied, 370 So.2d 462 (Fla.1979); and Dacus v. State, 307 So.2d 505 (Fla.2d DCA 1975); argues that the search and seizure should be upheld on the ground that the marijuana was in “plain sight” when the defendants opened their door to the officers.

This contention was not presented to the trial court at the hearing on the motion to suppress, which was concerned only with the issue of whether the officer's standing on the chair in order to peer into the defendants' home was constitutionally permissible. Thus, it may not be considered for the first time on appeal. Silver v. State, 188 So.2d 300 (Fla.1966); State v. Giardino, 363 So.2d 201 (Fla.3d DCA 1978).

Even were the issue properly before us, the record reveals that the police knocked on the door only after and because the officer had seen the cannabis from his perch on the chair. Thus, the sighting through the open door was a direct product and exploitation of the illegal window view. Any evidence seized as a result was required, therefore, to be suppressed as “fruit of the poisonous tree.” Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

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225 Ariz. 544
Court of Appeals of Arizona,
Division 2, Department B.

The STATE of Arizona, Appellee,
v.
Lando Onassis AHUMADA, Appellant.

No. 2 CA–CR 2010–0093.
|
Oct. 28, 2010.

Synopsis

Background: Defendant was convicted in the Superior Court, Pima County, John S. Leonardo, J., of possession of the narcotic drug cocaine and drug paraphernalia. He appealed from denial of motion to suppress evidence.

The Court of Appeals, Eckerstrom, J., held that, as an issue of first impression, the seizure of object in defendant's pocket during the non-*Terry* patdown did not exceed scope of the search under plain feel exception to the warrant requirement.

Affirmed.

Attorneys and Law Firms

****909** Terry Goddard, Arizona Attorney General By Kent E. Cattani and Alan L. Amann, Tucson, Attorneys for Appellee.

Robert J. Hirsh, Pima County Public Defender By David J. Euchner, Tucson, Attorneys for Appellant.

***545** *OPINION*

ECKERSTROM, Judge.

¶ 1 After a jury trial, appellant Lando Ahumada was convicted of possessing both the narcotic drug cocaine and drug paraphernalia. He was sentenced to substantially mitigated, concurrent prison terms of 2.25 and .75 years. He argues the trial court should have granted his motion to suppress the cocaine found in his pocket because the officer's search exceeded the scope of the consent Ahumada had given. He also argues the search was unlawful under the "plain-feel" doctrine. Because we conclude the evidence was lawfully seized under that doctrine, we affirm the trial court's ruling and, in turn, Ahumada's convictions and sentences.

Factual and Procedural Background

¶ 2 When reviewing the denial of a motion to suppress evidence, we consider only the evidence presented at the suppression hearing, viewing that evidence in the light most favorable to upholding the trial court's ruling. *State v. Teagle,* 217 Ariz. 17, ¶ 2, 170 P.3d 266, 269 (App.2007). Tohono ***546** ****910** O'Odham police officer Paul South testified he was called to the Desert Diamond Casino to respond to a "probable drug transaction." There, he viewed a surveillance video in which a person he later identified as Ahumada approached a man sitting at the casino bar. The men spoke briefly and looked around, "making sure that no one was watching them." Then the seated man " handed something up" to Ahumada, who placed the item in his pocket.

¶ 3 South found Ahumada near the slot machines, identified himself, and asked Ahumada his name and whether "he had anything illegal on him." Ahumada said he did not. South then asked Ahumada to empty his pockets, which Ahumada appeared to do. South next asked if he could conduct a "pat down," to which Ahumada agreed. South felt an object in Ahumada's right pocket and asked what it was. Ahumada said he did not know, and South reached in and pulled out "two small plastic bindles with a white rocky substance in them."

¶ 4 The trial court denied Ahumada's motion to suppress, finding it was "objectively reasonable" for the officer to believe Ahumada's consent to the pat-down included the inside of his pants pockets. The evidence was admitted at trial, Ahumada was found guilty, and this appeal followed his conviction and sentencing.

Discussion

¶ 5 Ahumada argues the trial court abused its discretion when it denied his motion to suppress the evidence found in his pocket. Specifically, he contends the officer exceeded the scope of Ahumada's consent to a pat-down when he reached into Ahumada's pocket. When reviewing a trial court's ruling on a motion to suppress, "we evaluate discretionary issues for an abuse of discretion but review legal and constitutional

issues de novo." *State v. Huerta,* 223 Ariz. 424, ¶ 4, 224 P.3d 240, 242 (App.2010). We will uphold a trial court's ruling on a motion to suppress if it is correct for any reason. *State v. Cañez,* 202 Ariz. 133, ¶ 51, 42 P.3d 564, 582 (2002).

¶ 6 "The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures." *State v. Jones,* 188 Ariz. 388, 395, 937 P.2d 310, 317 (1997). Generally, searching a person without a warrant supported by probable cause is unreasonable. *State v. Gant,* 216 Ariz. 1, ¶ 8, 162 P.3d 640, 642 (2007), *aff'd, Arizona v. Gant,* ——U.S. ——, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). However, " 'a few specifically established and well-delineated exceptions' " exist. *Id., quoting Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Consent, voluntarily given, is one of those exceptions. *State v. Davolt,* 207 Ariz. 191, ¶ 29, 84 P.3d 456, 468 (2004). Here, Ahumada does not contend his consent to the pat-down was involuntary; rather, he argues the officer exceeded the scope of that consent.

Scope of Consent

¶ 7 "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno,* 500 U.S. 248, 251, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991); *accord State v. Swanson,* 172 Ariz. 579, 584 n. 5, 838 P.2d 1340, 1345 n. 5 (App.1992). Here, the trial court found that a reasonable person would have understood Ahumada's consent to the pat-down to include consent to search his pockets. The court concluded Officer South's previous request for Ahumada to empty his pockets had "identified the object of the search." *Cf. United States v. Ross,* 456 U.S. 798, 824, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982) (holding scope of warrantless search of automobile "defined by the object of the search and the places in which there is probable cause to believe that it may be found"). It also found Ahumada had not objected to the search of his pocket and concluded this circumstance tended to show it was reasonable for South to believe Ahumada had consented. *See United States v. Jones,* 356 F.3d 529, 534 (4th Cir.2004) ("[A] suspect's failure to object (or withdraw his consent) when an officer exceeds limits allegedly set by the suspect is a strong indicator ***547** ****911** that the search was within the proper bounds of the consent search.").

¶ 8 Ahumada counters that a pat-down is reasonably understood to involve the passing of an officer's hands over the outside of a person's clothing only, commonly to determine whether the person is carrying a weapon. This understanding of a "pat down" is consistent with our Supreme Court's use of the term—and the limitations on that type of search—in the context of investigatory detentions conducted pursuant to *Terry v. Ohio,* 392 U.S. 1, 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

¶ 9 *Terry* held that, "[w]hen 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 to others," the officer may "conduct a carefully limited search of the outer clothing of such person[ ] in an attempt to discover weapons [that] might be used to assault him." *Id.* at 24, 30, 88 S.Ct. 1868. Since *Terry,* the Court has emphasized that " '[t]he purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence.' " *Minnesota v. Dickerson,* 508 U.S. 366, 373, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993), *quoting Adams v. Williams,* 407 U.S. 143, 146, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); *see also United States v. Casado,* 303 F.3d 440, 447 (2d Cir.2002) (officer exceeded scope of *Terry* by reaching inside suspect's pocket and removing all items without first doing pat-down for weapons). And lower courts repeatedly have held that a pat-down search does not lawfully include reaching into the pockets of clothing to secure items that could not possibly have resembled weapons during the pat-down. *See, e.g., United States v. Miles,* 247 F.3d 1009, 1014–15 (9th Cir.2001) (officer's manipulation of box in suspect's pocket exceeded scope of *Terry* pat-down when object "could not possibly be a weapon"); *State v. Valle,* 196 Ariz. 324, ¶ 12, 996 P.2d 125, 129 (App.2000) (search of pocket exceeded scope of *Terry* frisk when officer testified he had not believed object was weapon); *Davis v. State,* 829 S.W.2d 218, 219, 221 (Tex.Crim.App.1992) (search of matchbox found in suspect's coat pocket during pat-down exceeded scope of weapons search under *Terry* because "unreasonable for two armed police officers to fear a razor blade that might be contained in a matchbox").

¶ 10 Although the pat-down search here was not conducted pursuant to *Terry* and therefore was not necessarily subject to the constraints placed upon such searches in that case and its progeny, we cannot address the scope of consent to a pat-down search without considering the objectively reasonable understandings of its nature, purpose, and extent. *See Jimeno,* 500 U.S. at 251, 111 S.Ct. 1801. We think it relevant that, in the most common context for pat-down searches —namely, those conducted by officers during investigatory

encounters—a pat-down is understood by our jurisprudence, and presumably therefore by our officers, to be a search for weapons, conducted for officer safety, that does not include searching the inside of the suspect's pockets for other contraband.

¶ 11 Nor, in our view, does South's previous focus on the contents of Ahumada's pockets necessarily define the scope of the pat-down later requested. While South's request that Ahumada empty his pockets undoubtedly conveyed the officer's interest in their contents, Ahumada could have reasonably understood that request, like the request to conduct a pat-down, as an effort by South to satisfy himself that Ahumada was unarmed. And Ahumada's strategic decision to empty his pockets only partially, presumably so that he would not expose the cocaine, tends to contradict the theory that he implicitly was consenting to the full search of the inside of his pockets when he agreed to the pat-down moments later.

¶ 12 The trial court cited *Ross* for the proposition that the scope of a search can be defined by the apparent object of the search, a principle also articulated in *Jimeno.* "The scope of a search is generally defined by its expressed object." 500 U.S. at 251, 111 S.Ct. 1801; *see also Ross,* 456 U.S. at 824, 102 S.Ct. 2157 (holding scope of warrantless search of automobile "defined by the object of the search and the places in which there is probable cause to believe that it may be ***548** ****912** found").[1] But in *Jimeno,* the officer expressly articulated to the defendant that the object of the search was narcotics, 500 U.S. at 251, 111 S.Ct. 1801, and in *Ross,* the circumstances preceding the search made its object clear. 456 U.S. at 800–01, 102 S.Ct. 2157. Here, by contrast, South asked only if Ahumada possessed anything illegal. And, as discussed above, the fact that South previously had asked Ahumada to empty his pockets did not clarify the officer's goal in conducting the pat-down thereafter. Thus, in our view, South's previous request that Ahumada empty his pockets did little to objectively clarify the scope of the consent Ahumada provided when he agreed to the pat-down.

¶ 13 Although no Arizona case has squarely addressed the scope of consent to a non-*Terry* pat-down, cases with similar facts from other jurisdictions are split as to whether a search into a suspect's pocket exceeds the scope of consent to a pat-down. *Compare United States v. Smith,* 649 F.2d 305, 307, 309 (5th Cir.1981) (when consent to pat-down given to drug enforcement agent, officer "acted well within the scope of a reasonable narcotics pat-down" in removing cocaine from inside pocket of suspect's jacket), and *Aranda v. State,* 226 Ga.App. 157, 486 S.E.2d 379, 382 (1997) (consent to pat-down not exceeded by officer's investigation of "suspicious cardboard-like object" under suspect's shirt when "consent given did not restrict the patdown to one for weapons"), *with United States v. Lemons,* 153 F.Supp.2d 948, 963 (E.D.Wis.2001) (finding consent to pat-down did not allow for search of pockets because "the ordinary person in either the suspect's or the officer's position would know that a consent to a pat-down means a consent to a *Terry* pat-down search"), *Sanders v. State,* 732 So.2d 20, 21 (Fla.App.1999) ("[I]n the absence of additional circumstances which would justify a more complete search, consent to a mere pat down does not include consent to reach into the pockets of a suspect and retrieve the contents."), *State v. Labine,* 733 N.W.2d 265, ¶ 20 (S.D.2007) (finding officer's reaching into suspect's pockets and removing plastic bag of marijuana exceeded scope of consent for pat-down), *and Royal v. Commonwealth,* 37 Va.App. 360, 558 S.E.2d 549, 552 (2002) (consent to pat-down search did not give officer permission to search suspect's pockets either at time of pat-down or after temporary recess).

¶ 14 Here, the trial court found it "a close question" but concluded the state had proven Ahumada had consented to a search of his pocket. We agree it was a close question but would not necessarily reach the same legal conclusion, given that the state had the burden to show the search was within the scope of consent. *See Valle,* 196 Ariz. 324, ¶ 19, 996 P.2d at 131; *see also State v. Adams,* 197 Ariz. 569, ¶ 16, 5 P.3d 903, 906 (App.2000) (reviewing constitutionality of search de novo). The facts and circumstances of this case appear ambiguous at best as to whether reasonable persons would understand that, in consenting to the pat-down, they were agreeing to an intrusion into their pockets. *See State v. Cañez,* 202 Ariz. 133, ¶ 53, 42 P.3d 564, 582 (2002) (consent to search must be expressed in "unequivocal words or conduct"). But, because Ahumada's consent to the pat-down clearly authorized the officer to feel the presence of the rock-like substance through the outer areas of Ahumada's clothing, and because it was immediately apparent to South that the substance was contraband, we conclude, for the reasons set forth below, the search was lawful under the plain-feel doctrine even in the absence of Ahumada's consent.

Plain Feel

¶ 15 Under the plain-feel exception to the warrant requirement, which has been ***549** ****913** likened to the plain-view exception, an officer may reach into a suspect's pocket and seize an item of contraband if the officer " lawfully

pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent." *Minnesota v. Dickerson,* 508 U.S. 366, 375, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993).[2] In other words, "[i]n order to seize an item discovered by feel in a pat-down search, the officer must have probable cause to believe that the item is contraband." *In re Pima County Juv. Action No. J–103621–01,* 181 Ariz. 375, 378, 891 P.2d 243, 246 (App.1995); *see also Texas v. Brown,* 460 U.S. 730, 741–42, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) (plurality opinion) (explaining that "immediately apparent" language does not require higher degree of certainty than probable cause); *cf. State v. Garcia,* 162 Ariz. 471, 474, 784 P.2d 297, 300 (App.1989) (search and seizure based upon plain view required probable cause to believe envelope contained drugs).

¶ 16 Here, South testified he had seen a surveillance video that showed Ahumada receive something from another man. Ahumada then put that item into his pocket as the two looked around, as if to determine whether anyone was watching—behavior South associated from his training and experience with "drug transactions." Ahumada was then under video surveillance from the time the transaction was recorded until South approached him. South asked Ahumada to empty his pockets, and Ahumada removed everything but the "lump" South felt when he patted him down. When asked by the court if he had "draw[n] any conclusions as to what [he] suspected it might be in the pocket before [he] took the object out," South responded, "[i]llegal drugs," specifically "[c]rack, coke, whatever they can pack up in a rock formation." He also testified that, in a pat-down, the feel of illegal drugs is "very distinct" and that he is able to detect marijuana, powdered cocaine, and rock-shaped drugs by touch.

¶ 17 Although we acknowledge that rock-like items in a pocket are not necessarily contraband, the circumstances surrounding the encounter here supported South's suspicion that the rock-like substance in Ahumada's pocket was, in all probability, illegal drugs. Ahumada argues these facts did not give South probable cause to perform a further search of his pocket and seize the cocaine. He contends South "did not know what was in the pocket; he suspected drugs, but the contents of the pocket were not 'immediately apparent' to him."[3]

¶ 18 But probable cause does not require certain knowledge, it requires only facts sufficient to " 'warrant a [person] of reasonable caution in the belief' that certain items may be contraband or stolen property or useful as evidence of a crime." *Brown,* 460 U.S. at 742, 103 S.Ct. 1535, *quoting Carroll v. United States,* 267 U.S. 132, 162, 45 S.Ct. 280, 69 L.Ed. 543 (1925). "A 'practical, nontechnical' probability that incriminating evidence is involved is all that is required." *Id., quoting Brinegar v. United States,* 338 U.S. 160, 176, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949). And, relevant to the determination of probable cause is an officer's factual knowledge based on his law enforcement experience. *See Brown,* 460 U.S. at 742–43, 103 S.Ct. 1535 (officer's knowledge "that balloons tied in the manner of the one possessed by Brown were frequently used to carry narcotics" among circumstances supplying probable cause to seize item under plain-view exception).

¶ 19 Ahumada points to two cases in which this court has concluded the state did not show the officer had probable cause to seize items felt in a pat-down search, *State v. Valle,* 196 Ariz. 324, 996 P.2d 125 (App.2000), and *Pima County No. J–103621–01.* But in those cases, the state presented no evidence ***550 **914** that the officer had known, by its feel, that the item was contraband. *Valle,* 196 Ariz. 324, ¶ 12, 996 P.2d at 129; *Pima County No. J–103621–01,* 181 Ariz. at 376, 378, 891 P.2d at 244, 246. And, under conditions similar to those in this case, other courts have held an officer had probable cause to seize contraband from inside a suspect's clothing based on the feel of the contraband and the other surrounding circumstances. *See, e.g., United States v. Craft,* 30 F.3d 1044, 1045 (8th Cir.1994) (plain-feel doctrine permitted seizing drugs from inside defendant's pant leg when officer felt bulges on defendant's ankles "like hard, compact packages" and officer "aware of the objects' incriminating character" based, in part, on experience as drug enforcement officer at airport); *Doctor v. State,* 596 So.2d 442, 445 (Fla.1992) (seizure of cocaine lawful because totality of circumstances gave officer probable cause to believe defendant carrying crack cocaine in groin area); *State v. Rushing,* 935 S.W.2d 30, 33 (Mo.1996) (finding totality of circumstances gave officer probable cause to reach into suspect's pocket and seize container holding cocaine); *Commonwealth v. Johnson,* 429 Pa.Super. 158, 631 A.2d 1335, 1340–41 (1993) (officer's tactile impression and years of experience "combined sufficiently to betray the illegal nature of the object on appellee's person," giving officer probable cause to seize); *State v. Guy,* 172 Wis.2d 86, 492 N.W.2d 311, 318 (1992) (officer's seizure of cocaine from defendant's pocket lawful when "[w]hat she felt and what she knew at the time she felt it" provided probable cause to believe bulge in pocket connected to criminal activity).

Disposition

¶ 20 We conclude the trial court was legally correct in denying Ahumada's motion to suppress evidence. Accordingly, we affirm his convictions and sentences.

CONCURRING: GARYE L. VÁSQUEZ, Presiding Judge and VIRGINIA C. KELLY, Judge.

All Citations

225 Ariz. 544, 241 P.3d 908, 594 Ariz. Adv. Rep. 10

Footnotes

1 Since then, the Court has not expressly extended the principle to searches of persons and one commentator suggests it ought not do so. *See* 4 Wayne R. LaFave, *Search and Seizure* § 8.1(c), at 28 (4th ed.2004) (stating the "*Jimeno* principle ... cannot be literally applied to consent searches of the person"). *But see Safford Unified Sch. Dist. No. 1 v. Redding,* —— U.S. ——, 129 S.Ct. 2633, 2649, 174 L.Ed.2d 354 (2009) (Thomas, J., concurring in part and dissenting in part) (noting *Ross* would apply to search of student); *Pinkney v. State,* 742 N.E.2d 956, 960 (Ind.Ct.App.2001) (citing *Jimeno* principle to support officer's search of pocket after suspect consented "to search his person for drugs and weapons," concluding pocket "might reasonably contain those specified items").

2 In *Dickerson,* the evidence was suppressed because the officer manipulated the item in the suspect's pocket before seizing it, thereby subjecting him to an additional search. 508 U.S. at 378, 113 S.Ct. 2130. Ahumada argues South manipulated the item before retrieving it, citing the surveillance video that captured the encounter. But the surveillance video shows the encounter from behind and thus does not show South's hands clearly enough to determine whether any manipulation occurred.

3 At the suppression hearing, however, defense counsel appeared to concede South had probable cause before reaching into Ahumada's pocket.

867 S.W.2d 338
Court of Criminal Appeals of Tennessee,
at Nashville.

STATE of Tennessee, Appellant,

v.

David D. BOWLING, Appellee.

Jan. 21, 1993.
|
No Permission to Appeal Applied
for to the Supreme Court.

Synopsis

In prosecution respecting hit and run accident resulting in death of victim, defendant moved to suppress evidence. The Criminal Court, Davidson County, Walter C. Kurtz, J., granted motion. State appealed. The Court of Criminal Appeals, Peay, J., held that: (1) officer's actions, of getting on his hands and knees with his head almost touching ground and looking into garage through partially raised garage door, was unconstitutional warrantless "search"; (2) inaccuracies in search warrant affidavit did not render search warrant invalid; and (3) search warrant affidavit, absent information obtained from unconstitutional search of garage, was insufficient to support probable cause for search respecting vehicle suspected to be involved in hit and run accident.

Affirmed.

Attorneys and Law Firms

***339** Charles W. Burson, Atty. Gen. and Reporter, Kathy M. Principe, Asst. Atty. Gen., Victor S. Johnson, III, Dist. Atty. Gen., James Walsh, Asst. Dist. Atty. Gen., Nashville, for appellant.

David E. High, Nashville, for appellee.

OPINION

PEAY, Judge.

This case is an appeal by the State of Tennessee pursuant to T.R.A.P. 3(c)(1) from an order granting the defendant's motion to suppress certain evidence.

Essentially four questions are raised on appeal. First, whether Officer Poteete's actions of getting down on his hands and knees with his head very near to the ground, and looking into the garage violated the defendant's reasonable expectation of privacy, constituting a warrantless search in violation of the Fourth Amendment of the United States Constitution and Article I, Section 7 of the Tennessee Constitution; second, whether the search warrant affidavit contained reckless misrepresentations of material facts; third, whether the search warrant affidavit, absent the information attained from the contested search, would be sufficient on its face to render probable cause; and fourth, whether the appeal in this case was timely filed and, therefore, should not be dismissed. Having reviewed these matters, we conclude that the appeal should not be dismissed, and we affirm the lower court's action.

To best analyze and understand the matters raised, we must first lay a factual foundation. On March 16, 1990, Officer Lloyd Poteete, a hit and run accident investigator for the Metropolitan Nashville Police Department, responded to a hit and run fatality on Murfreesboro Road in Nashville, Tennessee. The victim was walking on the shoulder of the road when she was struck from behind and killed by a vehicle which fled the scene. At the scene of the incident, several pieces of plastic and debris common to the type used on the front of vehicles and automobile grills were recovered. One of the recovered pieces was a Ford logo. A witness at the scene also indicated that the vehicle involved in the incident was a tan or light brown colored vehicle. After further investigation Officer Poteete ascertained that the recovered pieces were from the grill of a 1983 to 1986 Ford truck or Bronco.

Other than this information, there was little with which to proceed. However, on March 19, 1990, an anonymous individual telephoned the Nashville Police Department and stated that the defendant had been involved in the incident which had occurred on March 16, 1990. The informant added that the defendant had come home late at night driving a dark tan or brown Ford Bronco truck which had front end damage on it and that the truck was pulled behind a house on Springmont Drive. Officer Poteete followed up on this information, learning that the defendant had received a traffic ticket while driving the 1984 Ford truck and that the defendant's address was listed as 325 Overhill Drive in Old Hickory, Wilson County, Tennessee. Overhill Drive is located in a subdivision named "Springmont".

Pursuant to such information Officer Poteete, Metro Officer Ron Anderson, and Wilson ***340** County Deputy Ricky Knight proceeded to 325 Overhill Drive in the Springmont Subdivision. At this address they found a split-level house with a two car garage directly under the main living floor. A large driveway proceeded along the right side of the house and ended at two solid garage doors on this side of the house. Around the back of the home, a door with a window led into the garage. Also on the back of the house was a patio porch with another door which led into the house.

Upon arrival Officer Poteete knocked on the front door of the home while Officers Anderson and Knight went around to the back door. Officer Poteete continued to knock on the front door and received no response while Officer Knight knocked on the back door and also received no response. Officer Anderson, making his way back to the front of the house, stopped and knocked on the door leading into the garage. As Officer Anderson knocked, he glanced through the window in the door and noticed a brown Bronco truck on the far side of the garage. Although he could not see the front end of the truck, he could see that the hood was slightly buckled, which indicated to him that there might be some damage to the front of the Bronco.

Officer Poteete walked away from the front door and was making his way around the side of the house towards the back when Officer Anderson notified him that he had observed a brown-colored Bronco in the garage. For some reason, however, Officer Anderson did not mention to Officer Poteete that he had observed the hood's being slightly buckled. At this time the officers were standing in the driveway in front of the two solid garage doors. While the garage doors have no windows, the door closest to the back yard and farthest from the truck had been left open approximately one and a half feet allegedly for the purpose of allowing the dog to come and go from the garage. Officer Poteete then got down on his hands and knees with his head very near to the ground and looked into the garage. From this position, he was able to see that the Ford Bronco had sustained front end damage.

Subsequently, a search warrant was obtained based upon an affidavit, the pertinent parts of which include:

> Affiant [Officer Poteete] is an officer of the Metropolitan Nashville, Tennessee, Police Department, and is currently assigned to the Traffic Division as a Hit & Run investigator. ... On Friday, March 16, 1990, affiant responded to the scene of a fatal hit and run accident which occurred at 1132 Murfreesboro Road, in Nashville, Davidson County, Tennessee, at approximately 1:30 A.M. ... On Monday, March 19, 1990, Officer Earl Watson of the Metropolitan Nashville Police Department, received an anonymous telephone call advising him of the location of a vehicle possibly involved in the fatal accident. From information received, Officer Watson advised affiant that a "David Bowling" had returned to his residence, located on "*Springmont,*" at approximately 2:00 a.m. on the morning of the accident, and parked his vehicle, described as being possibly a brown Ford Bronco, in the *garage* of the residence, where it had not been moved again since that time. Further, the caller indicated that the vehicle appeared to have sustained damage to the grill area. Through his investigation, affiant determined that a "Springmont" street was located in the Springmont subdivision of Old Hickory, Wilson County Tennessee. After responding to the area with officers of the Wilson County Sheriff's Department, affiant received additional information from Officer Watson that a subject name "David Bowling" ... had *received* a parking ticket on a 1984 Ford truck ... on March 16, 1990 Affiant responded to that location, and while attempting to locate any one living at said residence, observed a brown Ford truck backed into a bay of the house's garage. (emphasis added)

While examining the first issue concerning Officer Poteete's action in looking into the defendant's garage, we note that the Constitution of the State of Tennessee guarantees "[t]hat the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures ...". Tenn. Const. Art. I, § 7. This same guarantee is embodied in the Fourth ***341** Amendment of the United States Constitution. The touchstone of unreasonable search and seizure analysis is "whether a person has a 'constitutionally protected reasonable expectation of privacy' ". *California v. Ciraolo,* 476 U.S. 207, 211, 106 S.Ct. 1809, 1811, 90 L.Ed.2d 210 (1986); *see Katz v. United States,* 389 U.S. 347, 360, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring).

Through *Katz* and its progeny, the United States Supreme Court has pronounced a two-part inquiry in determining an individual's constitutionally protected reasonable expectation of privacy. First, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable? *Ciraolo,* 476 U.S. 207, 211, 106 S.Ct. 1809, 1811, 90 L.Ed.2d 210 (1986); *Smith v. Maryland,* 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979); *Katz,* 389 U.S.

347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576. Such analysis has been applied in this state. *See State v. Roode,* 643 S.W.2d 651, 652–3 (Tenn.1982).

In determining whether the defendant manifested a subjective expectation of privacy, we are aware that neither the Fourth Amendment nor Article I, Section 7 protects what a citizen "knowingly exposes to the public". *See Katz,* 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576; *State v. Marcus Ellis,* No. 01–C–01–9001–CR–00021, 1990 WL 198876 Robertson County (Tenn.Crim.App. filed December 12, 1990, at Nashville). That which a citizen knowingly exposes to the public is that in which he or she has not manifested subjective expectation of privacy.

However, in the instant case it is apparent that the defendant did not knowingly expose the truck to the public. His truck was behind a solid, completely closed garage door. While the only other garage door was open, it had been raised a mere one and a half feet to allegedly enable the dog to come and go from the garage. Therefore, the defendant clearly manifested a subjective expectation of privacy.

The issue hence becomes whether society is prepared to recognize as reasonable the defendant's expectation of privacy when he left the garage door open one and a half feet. "In pursuing this inquiry, we must keep in mind that '[t]he test of legitimacy is not whether the individual chooses to conceal assertedly "private" activity,' but instead 'whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.' " *Ciraolo,* 476 U.S. 207, 212, 106 S.Ct. 1809, 1812, 90 L.Ed.2d 210 (quoting *Oliver v. United States,* 466 U.S. 170, 182–83, 104 S.Ct. 1735, 1743, 80 L.Ed.2d 214 (1984)). Society has recognized that the resident of a home usually has a reasonable expectation of privacy in a garage. *See Taylor v. United States,* 286 U.S. 1, 52 S.Ct. 466, 76 L.Ed. 951 (1932). Therefore, in such areas where a reasonable expectation of privacy is usually accorded, "[a]n officer is permitted the same license to intrude as a reasonably respectful citizen". *State v. Seagull,* 95 Wash.2d 898, 632 P.2d 44, 47 (1981).

While the factual situation makes this a case of first impression in Tennessee, support exists for our conclusion in the decisions of our sister states. *See e.g. State v. Cloutier,* 544 A.2d 1277 (Me.1988). (Since officer did not bend over or move any object in order to improve his view, his observation of the marijuana while simply passing by the open window was not a search for purposes of Fourth Amendment); *State v. Adams,* 378 So.2d 72 (Fla.App.1979) (Officer's standing on chair and peering into window was held to violate occupants' reasonable expectation of privacy); *People v. Cagle,* 98 Cal.Rptr. 348, 351, 21 Cal.App.3d 57, 66 (1971) (Officer strayed from "normal access routes" when he peered into a bathroom window. His action was an unreasonable invasion of privacy).

It is the determination of this Court that Officer Poteete's actions of getting on his hands and knees with his head very near to the ground and looking into the garage are not those actions which society would permit of a reasonably respectful citizen. In making such a judgment, this Court has attempted to strike a balance between the individual's reasonable ***342** expectation of privacy and the permissible actions of an officer of the law.

We take great caution in rendering impermissible the actions of an officer employing only his or her bare physical faculties. However, Officer Poteete did not just sway to one side or the other to observe something. He did not even merely bend over slightly to observe something. He got down on his hands and knees with his head almost touching the ground and looked into the garage. We, therefore, conclude that the officer's actions constituted a warrantless search which violated the personal and societal values protected by the Fourth Amendment and Article I, Section 7.

While the State brought this appeal, the defendant raised three additional matters. The second issue before us is whether the search warrant contained reckless misrepresentations of material facts. It is true that Officer Poteete reported in the search warrant affidavit certain information which later was discovered to be incorrect. He stated that the anonymous informer had told the police that the car would be parked in the garage. The informant had actually told the officers that the truck would be parked behind the house. In addition, the officer reported that the defendant had received a parking ticket on the very same day of the accident, March 16, 1990. Actually, the defendant had received a parking ticket on February 28, 1990, and had paid for that ticket on March 16, 1990. Faced with these facts, the trial court determined that these incorrect statements were made with a "reckless disregard for the truth". The record supports this finding.

The Tennessee Supreme Court has set forth two circumstances which authorize impeachment of a search warrant affidavit: (1) when "a false statement [is] made with intent to deceive the Court, whether material or immaterial

to the issue of probable cause, and (2) [when] a false statement, essential to the establishment of probable cause, [is] recklessly made". *State v. Little,* 560 S.W.2d 403, 407 (Tenn.1978). The trial court concluded that neither of these circumstances was present in the instant case. We agree with that conclusion.

At the evidentiary hearing the officers simply had no explanation for the mistakes in the affidavit. Although the trial court expressed concern that the facts reported by the informant may have been somehow changed to fit what was actually found, the trial court did not conclude that there was an intent to deceive the court. Having reviewed the entire situation as reflected in the record, we agree with the trial court's determination.

We further determine that the trial court appropriately dismissed the second circumstance also. Although the inaccuracies were reckless misrepresentations, they were not reckless misrepresentations of material fact. The information regarding where the vehicle was parked and when a parking ticket was received were not essential to the assessment of whether the affidavit stated probable cause. Essential facts were, for example, that the informant reported the defendant coming in late on the night of the accident; that the informant mentioned that the vehicle was a Ford Bronco; and that the informant stated the vehicle had sustained front end damage. Unlike the information regarding the parking ticket and the place where the vehicle was parked, these facts greatly aided the magistrate in determining whether the affidavit stated probable cause. As such, this contention provides no basis for invalidating the search warrant.

The third issue raised on appeal is whether the search warrant affidavit, absent the information attained from the contested search, would be sufficient to support probable cause. We concluded above that the contested search was a warrantless search in violation of the Fourth Amendment of the United States Constitution and Article I, Section 7 of the Tennessee Constitution, and consequently, the information attained therefrom was tainted and inadmissible. The trial court held and the State concedes that if the information attained from the contested search was inadmissible, the search warrant affidavit would be insufficient to support a finding of probable cause. We affirm this determination.

In *State v. Jacumin,* 778 S.W.2d 430 (Tenn.1989), our Supreme Court rejected the totality of circumstances test, which the United States Supreme Court expounded in ***343** *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Our Supreme Court instead reaffirmed the two-prong *Aguilar–Spinelli* test as the standard to be applied to a search warrant based upon an unknown or unidentified citizen informant. *Jacumin,* 778 S.W.2d 430, 436. The latter test requires that the affidavit establish: (1) the informant's "basis of knowledge" and (2) the informant's "veracity". *Jacumin,* 778 S.W.2d 430, 432; *see Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). Essentially, the first prong "inquire [s] as to how the informant concluded the criminal activity [had taken] place: 'How does he [or she] know that?' The second 'prong' inquire[s] into the informant's veracity: 'Why do I believe him [or her]?' " Raybin, *Criminal Practice and Procedure,* § 18.58, p. 584.

The affidavit entirely fails to indicate the basis of the informant's knowledge as it makes no mention of how the informant obtained the information. Since the first prong was clearly not established, there is no need to analyze whether the second prong was proven. We conclude that the trial court correctly found the information in the affidavit, excluding the evidence from the contested search, insufficient to support probable cause.

The fourth and final issue before us is whether the appeal in this case was timely filed and, therefore, should not be dismissed. This Court examined this issue when the defendant filed a Motion to Dismiss Appeal and Memorandum in Support Thereof on January 17, 1992. On February 5, 1992, this Court denied the motion, declaring that justice required the appeal to proceed. We reaffirm that determination today. Consequently, this issue is without merit.

Having examined each contention raised, it is the determination of this Court that the trial court's order suppressing certain evidence be affirmed.

WADE and TIPTON, JJ., concur.

All Citations

867 S.W.2d 338

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312 N.J.Super. 13
Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff-Respondent,
v.
Frederick A. CARGILL, Defendant-Appellant.

Submitted April 27, 1998.
|
Decided May 13, 1998.

Synopsis

Defendant was convicted in the Superior Court, Law Division, Middlesex County, of first-degree possession of cocaine with intent to distribute. Defendant appealed. The Superior Court, Appellate Division, Landau, J.A.D., held that: (1) trooper was justified in ordering defendant out of vehicle and conducting patdown, due to safety concerns; (2) seizure of hard package of crack cocaine concealed in defendant's pants was permitted via plain touch doctrine; and (3) prosecution was not statutorily barred by defendant's prior conspiracy conviction in federal court involving crack distribution activities.

Affirmed.

Attorneys and Law Firms

****319** ***15** Ivelisse Torres, Public Defender, for defendant-appellant (Susan Brody, Assistant Deputy Public Defender, of counsel and on the brief).

***16** Peter Verniero, Attorney General, for plaintiff-respondent (Bennett A. Barlyn, Deputy Attorney General, of counsel and on the brief).

Before Judges LANDAU and NEWMAN.

Opinion

The opinion of the Court was delivered by

LANDAU, J.A.D.

Defendant Frederick A. Cargill was found guilty as charged following jury trial on counts of third degree possession of cocaine (*N.J.S.A.* 2C:35-10a(1)) and first degree possession of cocaine with intent to distribute (*N.J.S.A.* 2C:35-5a(1), b(1)). Following merger of the possession count into the latter count, he was sentenced to a custodial term of twelve years, to be served concurrently with a twenty-seven year federal sentence he is serving for conspiracy to distribute cocaine. Appropriate fees, penalties and license suspension were imposed.

On appeal defendant contends:

POINT I

DEFENDANT'S PROSECUTION IN NEW JERSEY FOR POSSESSION OF COCAINE AND POSSESSION WITH THE INTENT TO DISTRIBUTE WAS BARRED BY HIS PREVIOUS CONVICTION IN FEDERAL DISTRICT COURT FOR THE SAME CONDUCT.

POINT II

THE COCAINE SEIZED FROM DEFENDANT AFTER THE TROOPER (1) IMPROPERLY ORDERED HIM TO EXIT THE CAR AND (2) UNLAWFULLY SEIZED A PACKAGE THAT THE TROOPER HAD ALREADY ASCERTAINED DID NOT CONTAIN A WEAPON, WAS INADMISSIBLE.

A. The Trooper, Who Had No Objective Basis for a Heightened Awareness of Danger, Unlawfully Ordered Defendant to Exit the Car.

B. Since the Contents of the Package of Cocaine Concealed in Defendant's Pants Was Not Immediately Identifiable by Touch, Seizure of the Package Was Not Justified Under the "Plain Touch" Doctrine.

POINT III

THE COURT ERRED IN INTRODUCING DEFENDANT'S INCULPATORY LETTER, ALONG WITH DOCUMENTS PURPORTING TO AUTHENTICATE HIS SIGNATURE, WITHOUT AN INSTRUCTION AS TO THE JURY'S ROLE IN EVALUATING ****320** THE EVIDENCE. (Not Raised Below).

POINT IV

***17** A CORRECT BALANCING OF AGGRAVATING AND MITIGATING FACTORS SHOULD HAVE

RESULTED IN THE IMPOSITION OF A MINIMUM TERM.

We have considered each of these arguments and find them to be without merit. *R.* 2:11-3(e)(2).

The initial search and seizure emanated from a traffic violation vehicle stop during which the driver admitted to driving without a valid license. The record is sufficient to provide support for the trooper's safety concerns when his routine questions were totally ignored by defendant, who was in the passenger seat of the vehicle. Those reasonable concerns warranted ordering defendant out of the car and a weapons pat-down, upon observation of a large bulge in defendant's pants. This resulted in discovery of the hard package of crack cocaine by plain touch. We find no constitutional violation, *see State v. Smith,* 134 *N.J.* 599, 615-18, 637 *A.*2d 158 (1994)(requiring some fact or facts which would impel an objectively reasonable officer to a heightened awareness of possible danger); *Minnesota v. Dickerson,* 508 *U.S.* 366, 113 *S.Ct.* 2130, 124 *L.Ed.*2d 334 (1993). Unlike *State v. Jackson,* 276 *N.J.Super.* 626, 648 *A.*2d 738 (App.Div.1994), and *Dickerson, supra,* the judge who heard the testimony in the suppression hearing believed the trooper's testimony respecting immediate recognition, by touch and experience, of the probable nature of the hard object detected during pat-down of the bulge.

Defendant contends that as the federal conspiracy indictment and conviction involved his crack distribution activities in "North Carolina and elsewhere" between 1988 and January 30, 1995, and the New Jersey charges arose in 1994, the New Jersey prosecution should have been barred under *N.J.S.A.* 2C:1-11 and under our State constitutional guarantee of fundamental fairness. We reject the contention for the reasons enumerated below, any one of which would suffice.

1. The tardily raised defense was waived under *R.* 3:10-2(c) because not asserted prior to trial.

***18** 2. Subject to *N.J.S.A.* 2C:1-11, conviction of a federal offense does not bar State prosecution even if the proscribed conduct arises out of the same episode. *Heath v. Alabama,* 474 *U.S.* 82, 88-89, 106 *S.Ct.* 433, 437, 88 *L.Ed.*2d 387, 394-95 (1985); *State v. Goodman,* 92 *N.J.* 43, 51, 60, 455 *A.*2d 475 (1983)(Schreiber, J. concurring); *State v. Cooper,* 54 *N.J.* 330, 336-39, 255 *A.*2d 232 (1969), *cert. denied,* 396 *U.S.* 1021, 90 *S.Ct.* 593, 24 *L.Ed.*2d 514 (1970); *State v. Ellis,* 280 *N.J.Super.* 533, 550, 656 *A.*2d 25 (App.Div.1995). However, under *N.J.S.A.* 2C:1-11, the bar to subsequent prosecution applies only where the two prosecutions are based on the "same conduct" *and* only where the proofs necessary to the two prosecutions meet the statutory test for congruence. Cannel, *New Jersey Criminal Code Annotated,* comment 3 on *N.J.S.A.* 2C:1-11 (1997-98). The phrase "same conduct" has been uniformly held to mean identical conduct; that is, conduct involving one discrete set of actions occurring on only the one occasion. *State v. Jones,* 287 *N.J.Super.* 478, 487, 671 *A.*2d 586 (App.Div.1996); *State v. Walters,* 279 *N.J.Super.* 626, 632, 653 *A.*2d 1176 (App.Div.), *certif. denied,* 141 *N.J.* 96, 660 *A.*2d 1195 (1995); *State v. Buhl,* 269 *N.J.Super.* 344, 368, 635 *A.*2d 562 (App.Div.), *certif. denied,* 135 *N.J.* 468, 640 *A.*2d 850 (1994); *State v. Di Ventura,* 187 *N.J.Super.* 165, 172-73, 453 *A.*2d 1354 (App.Div.1982), *certif. denied,* 93 *N.J.* 261, 460 *A.*2d 666 (1983); *State v. Ashrue,* 253 *N.J.Super.* 181, 184, 601 *A.*2d 265 (Law Div.1991). Overlapping conduct is not identical conduct for purposes of *N.J.S.A.* 2C:1-11. *Jones, supra,* 287 *N.J.Super.* at 487, 671 *A.*2d 586; *Di Ventura, supra,* 187 *N.J.Super.* at 173, 453 *A.*2d 1354; *Ashrue, supra,* 253 *N.J.Super.* at 184, 601 *A.*2d 265.

As a commentator has observed respecting *N.J.S.A.* 2C:1-11a:

The bar to subsequent prosecution applies only where the two prosecutions are based on the "same conduct," *State v. Di Ventura,* 187 *N.J.Super.* 165, 172-173, 453 *A.*2d 1354 (App.Div.1982). Cases have generally defined "same conduct" so strictly that ****321** prosecutions have not been barred. See *State v. Buhl,* 269 *N.J.Super.* 344, 367-70, 635 *A.*2d 562 (App.Div.), *certif. den.* 135 *N.J.* 468, 640 *A.*2d 850 (1994), where the court held that a state kidnapping charge was not barred by a federal kidnapping charge for the same incident on the ground that the elements of the ***19** offenses were not identical so that each required proof of a fact not required by the other. Given that the detail of definition of crimes varies from jurisdiction to jurisdiction and that many federal crimes are justified by an element dealing with interstate commerce, it is unlikely that such a strict approach will ever allow the application of this section.

Cannel, *New Jersey Criminal Code Annotated,* comment 3 on *N.J.S.A.* 2C:1-11 (1997-98).

Moreover, the federal crime of conspiracy and the State possession and possession with intent offenses are not congruent. The elements required to establish each are patently different. *See Jones, supra,* 287 *N.J.Super.* at 491,

671 *A.*2d 586; *State v. Sessoms,* 187 *N.J.Super.* 625, 455 *A.*2d 595 (Law Div.1982).

3. Respecting the "fundamental fairness" argument (*see State v. Yoskowitz,* 116 *N.J.* 679, 563 *A.*2d 1 (1989)), it is clear from the double jeopardy cases cited above that there is no constitutional basis for an expectation of freedom from State prosecution even where elements of the State and federal crimes are entirely congruent (which they are not in this case). *N.J.S.A.* 2C:1-11 could furnish a basis for such expectation only in New Jersey, and it is here inapplicable. Moreover, if simple "fairness" is the test, the fact that the New Jersey sentence has been run concurrently with the far longer federal sentence cannot be ignored.

As to the argument respecting introduction of defendant's signed letter, we note first that the defense counsel represented its voluntary execution in open court and in defendant's presence. This alone is sufficient to reject the argument. Moreover, no objection was made to the trial judge's instruction to the jurors, which permitted them to form their own conclusions as to its authenticity from other writings in the court file which bore defendant's signature. *See State v. Carroll,* 256 *N.J.Super.* 575, 598, 607 *A.*2d 1003 (App.Div.), *certif. denied,* 130 *N.J.* 18, 611 *A.*2d 656 (1992).

The twelve-year concurrent sentence was manifestly fair, indeed generous, in the circumstances.

Affirmed.

All Citations

312 N.J.Super. 13, 711 A.2d 318

276 N.J.Super. 626
Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff–Appellant,

v.

Norman JACKSON, Defendant–Respondent.

Submitted Sept. 13, 1994.
|
Decided Oct. 25, 1994.

Synopsis

The Superior Court, Law Division, Camden County, Colalillo, J., granted defendant's motion to exclude evidence of controlled dangerous substance (CDS) seized after patdown search, and state was granted leave to appeal by the Superior Court, Appellate Division. The Superior Court, Appellate Division, Arnold M. Stein, J.A.D., held that search violated defendant's Fourth Amendment rights, and evidence was properly excluded.

Affirmed.

Attorneys and Law Firms

****739** ***627** Edward F. Borden, Jr., Camden County Prosecutor, for appellant (Robert K. Uyehara, Jr., Asst. Prosecutor, of counsel, and on the letter brief).

***628** Raymond E. Milavsky, for respondent (Mr. Milavsky, on the letter brief).

Before Judges BRODY, LONG and A.M. STEIN.

Opinion

The opinion of the court was delivered by

ARNOLD M. STEIN, J.A.D.

We granted the State leave to appeal from the Law Division judge's order suppressing fifteen bags of cocaine seized from defendant's jacket pocket as a consequence of a *Terry*[1] patdown. Judge Colalillo upheld the reasonableness of the patdown of defendant's outer clothing, but suppressed the evidence seized from defendant's pocket as the product of an unreasonable search.

This case involves consideration and application of the "plain feel" or "plain touch" doctrine in a protective patdown situation, a corollary to the plain view doctrine. *Minnesota v. Dickerson,* 508 *U.S.* 366, —— n. 1, 113 *S.Ct.* 2130, 2134 n. 1, 124 *L.Ed.*2d 334, 343 n. 1 (1993). There are no reported New Jersey cases on the subject. The doctrine was recently addressed by the United States Supreme Court in *Dickerson, supra.*

On April 22, 1993, at approximately 12:45 p.m., Patrolman Weitzel of the Camden Police Department received a dispatch sending him to the 1800 block of South 6th Street in Camden. The dispatch informed him that a black male, with a gun, approximately five foot eleven inches, thin build, dressed in gold clothing, was taking CDS from a 1978 white, two-door Volvo, model 242, with New Jersey license plate HOS 13R. The record does not disclose the source of the information contained in the dispatch. Weitzel testified that the 1800 block of South 6th Street was a known drug trafficking area.

Weitzel immediately went to the scene where he observed defendant, a black male, dressed in a gold jacket and gold jeans. Defendant was in front of his home putting gas in his car, which fit the description in the dispatch: a white, two-door Volvo, model ***629** 242, with New Jersey license plate ****740** HOS 13R. He was not "taking CDS" from the vehicle.

When Weitzel patted defendant down for weapons, he discovered a bulge in the right jacket pocket. The State stipulated and Weitzel later testified that he was aware that the object in defendant's pocket did not feel like a weapon. Weitzel could not tell what the object was in the jacket pocket. The object was "hard but flexible." The "object" was fifteen small plastic bags containing cocaine.

We reject the State's contention that Officer Weitzel had probable cause to search defendant for narcotics. The frisk was for weapons, not for drugs. We need not decide whether Officer Weitzel's initial patdown of defendant was constitutionally permissible. A police officer may make a protective search for weapons

> where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; *the issue is whether a reasonably prudent man in*

the circumstances would be warranted in the belief that his safety or that of others was in danger.

[*Terry v. Ohio, supra,* 392 *U.S.* at 27, 88 *S.Ct.* at 1883, 20 *L.Ed.*2d at 909, *quoted in State v. Thomas,* 110 *N.J.* 673, 679, 542 *A.*2d 912 (1988) (emphasis added).]

Although art. I, ¶ 7 of the New Jersey Constitution of 1947 may give greater protection against unreasonable searches and seizures than the Fourth Amendment, *State v. Novembrino,* 105 *N.J.* 95, 145, 519 *A.*2d 820 (1987), our state constitution does not demand a higher standard than the Fourth Amendment in order to justify a frisk incident to a lawful investigatory stop. *State v. Valentine,* 134 *N.J.* 536, 543, 636 *A.*2d 505 (1994).

The test "is whether a reasonably prudent [person] in the circumstances would be warranted in the belief that his [or her] safety or that of others was in danger." *Terry, supra,* 392 *U.S.* at 27, 88 *S.Ct.* at 1868, 20 *L.Ed.*2d at 909. The protective search "must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Id.* at 29, 88 *S.Ct.* at 1884, 20 *L.Ed.*2d at 911 (cited in ***630** *State v. Lund,* 119 *N.J.* 35, 39, 573 *A.*2d 1376 (1990)). Once Officer Weitzel determined that the object in defendant's pocket was not a weapon and could not identify the object as contraband, the search went "beyond what is necessary to determine if the suspect is armed," and it went beyond the boundaries established by *Terry* and by *Sibron v. New York,* 392 *U.S.* 40, 65–66, 88 *S.Ct.* 1889, 1904, 20 *L.Ed.*2d 917, 936 (1968). *Dickerson, supra,* 508 *U.S.* at ——, 113 *S.Ct.* at 2136, 124 *L.Ed.*2d at 344.

The facts in this case are similar to those in *Dickerson.* During a protective search, the officer felt a small lump in defendant's jacket. He testified: "[A]s I pat-searched the front of his body, I felt a lump, a small lump, in the front pocket. I examined it with my fingers and it slid and it felt to be a lump of crack cocaine in cellophane." *Id.* at ——, 113 *S.Ct.* at 2133, 124 *L.Ed.*2d at 341. The officer reached into the "pocket and retrieved a small plastic bag containing" crack cocaine. *Id.* at —— – ——, 113 *S.Ct.* at 2133–34, 124 *L.Ed.*2d at 341. The Supreme Court upheld the validity of plain feel searches and seizures within constitutional limits: "The question presented today is whether police officers may seize nonthreatening contraband detected during a protective patdown search of the sort permitted by *Terry.* We think the answer is clearly that they may, so long as the officer's search stays within the bounds marked by *Terry." Id.* at ——, 113 *S.Ct.* at 2136, 124 *L.Ed.*2d at 344. Justice White, speaking for the Court, said:

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 ****741** 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* ***631** *justified by the same practical considerations that inhere in the plain view context.*

[*Id.* at ——, 113 *S.Ct.* at 2137, 124 *L.Ed.*2d at 345–46 (emphasis added).]

The search and seizure in *Dickerson* was improper because the officer realized that the lump was not a weapon and could identify it as "contraband only after 'squeezing, sliding and otherwise manipulating the contents of the defendant's pocket'—a pocket which the officer already knew contained no weapon." *Id.* at ——, 113 *S.Ct.* at 2138, 124 *L.Ed.*2d at 347 (citation omitted).

The critical facts in this case are virtually indistinguishable from those in *Minnesota v. Dickerson.* The State stipulated and Officer Weitzel later testified that the object in defendant's jacket pocket was not a weapon. He could not identify the "hard but flexible" object in the pocket. "[T]he officer's continued exploration of [defendant's] pocket after having concluded that it contained no weapon was unrelated to '[t]he sole justification of the search [under *Terry:*] ... the protection of the police officer and others nearby.' " *Id.* at —— – ——, 113 *S.Ct.* at 2138–39, 124 *L.Ed.*2d at 347 (quoting *Terry, supra,* 392 *U.S.* at 29, 88 *S.Ct.* at 1884, 20 *L.Ed.*2d at 911).

Affirmed.

648 A.2d 738

All Citations

276 N.J.Super. 626, 648 A.2d 738

Footnotes

1 *Terry v. Ohio,* 392 *U.S.* 1, 88 *S.Ct.* 1868, 20 *L.Ed.*2d 889 (1968).

20 N.E.3d 1116
Court of Appeals of Ohio,
Fifth District, Richland County.

STATE of Ohio, Plaintiff–Appellant

v.

David A. WEHR II, Defendant–Appellee.

No. 14CA46.
|
Oct. 1, 2014.

Synopsis

Background: Defendant who was charged with various drug offenses and tampering with evidence filed motion to suppress evidence found on his person as a result of a *Terry* pat down for weapons. The Court of Common Pleas, Richland County, No. 2013–CR–0764, granted motion. State appealed.

Holdings: The Court of Appeals, Gwin, P.J., held that:

officer's initial contact with defendant constituted a consensual encounter requiring no reasonable suspicion;

officer had reason to fear for his own or others' safety necessary to permit a pat down search of defendant's person;

seizure of pill bottle from defendant's pocket during lawful pat down search of his person was permissible under the plain feel doctrine; and

criminal nature of pill bottle retrieved from defendant's sock was immediately apparent such that officer could seize the bottle and open it pursuant to the plain view doctrine.

Reversed and remanded.

Attorneys and Law Firms

***1120** Jill Cochran, Assistant Prosecuting Attorney, Mansfield, OH, for Plaintiff–Appellant.

John O'Donnell III, Mansfield, OH, for Defendant–Appellee.

W. SCOTT GWIN, P.J., SHEILA G. FARMER, J., and JOHN W. WISE, J.

OPINION

GWIN, P.J.

{¶ 1} Plaintiff-appellant the State of Ohio appeals the May 14, 2014 Judgment Entry of the Richland County Court of Common Pleas granting defendant-appellee David A. Wehr, II's motion to suppress.

Facts and Procedural History

{¶ 2} On January 13, 2014, Wehr, was indicted with one count of possession of heroin in an amount greater than five grams but less than ten grams, in violation of R.C. § 2925.11(A) & (C)(6)(c), a felony of the third degree, one count of trafficking in heroin in an amount greater than five grams but less than ten grams in violation of R.C. § 2925.03(A)(2) & (C)(6)(d), a felony of the third degree, one count of tampering with evidence, in violation of R.C. § 2921.12(A)(1), a felony of the third degree, and one count of possession of Oxycodone (schedule II) in an amount less than bulk, in violation of R.C. § 2925.11(A) & (C)(1)(a), a felony of the fifth degree.

{¶ 3} On March 24, 2014, Wehr filed a motion to suppress the evidence seeking to suppress evidence found on his person as a result of a *Terry* pat down for weapons. The state filed a response on April 21, 2014. Wehr filed a supplemental memorandum on April 28, 2014. An evidentiary hearing was held on April 28, 2014. During ***1121** the suppression hearing, the state called one officer, Deputy Raymond Frazier with the Richland County Sherriff's Department.

A. Deputy Raymond Frazier.

{¶ 4} Deputy Frazier has worked for the Richland County Sheriff's Department for 14 years. Deputy Frazier is also a canine handler. On November 17, 2013, Deputy Frazier was parked in his marked cruiser in the parking lot of the Budget Inn located at 1336 Ashland Road in Mansfield, Ohio as part of his routine patrol. The hotel management did not like people loitering on the property. Officers generally would drive around the parking lot to make their presence known and keep an eye out for people drinking or loitering in the parking lot.

{¶ 5} At 8:54 p.m., Deputy Frazier saw a 2002 White Toyota four-door with two people sitting inside at the Budget Inn parking lot with no lights on. As the officer pulled behind the Toyota on his way to exit the parking lot, the passenger exited the vehicle and ran towards the hotel office. Deputy Frazier testified that he exited his vehicle and yelled at the man, "Hey, where are you going?" and received no response.

{¶ 6} At this point, Officer Frazier approached the Toyota to make contact with the driver and registered owner, Wehr, as he was concerned that a crime might have just occurred or that the Wehr might need some further assistance. During the conversation, Deputy Frazier noticed that Wehr was reaching and fidgeting with something down near the floorboards of the vehicle. Deputy Frazier asked Wehr several times to stop reaching down near the floorboards. Wehr continued to reach near the floorboards of the vehicle and did not show his hands, causing Deputy Frazier to be concerned that Wehr could have a weapon.

{¶ 7} Deputy Frazier requested assistance, which arrived shortly thereafter. After back up had arrived, Wehr was removed from the vehicle and questioned as to what he was doing reaching down near the floor. Deputy Frazier briefly checked the floor to determine if there were any visible weapons. Seeing none, he became concerned that Wehr might have secreted a weapon on his person. Deputy Frazier then conducted a pat down search for officer safety. During the pat down, a pill bottle was located in Wehr's sock in his right pant leg. Deputy Frazier removed the pill bottle and found it to be an Advil bottle. When asked by Deputy Frazier what was inside the pill bottle, Wehr responded that he did not know. Deputy Frazier opened the pill bottle and found individually wrapped bindles of heroin and Oxycodone pills inside.

{¶ 8} Wehr was questioned again about the pill bottle. He indicated that he did not know what was inside of the bottle. Wehr explained that the passenger had thrown the pill bottle on the floor prior to exiting the vehicle and that Wehr had picked the bottle up and tucked it into his sock.

{¶ 9} A free-air canine sniff was performed of the vehicle and the canine alerted to both sides of the vehicle. During a search of the vehicle a kitchen plate, razor blade, a cut straw and a set of digital scales were recovered from the area of the front passenger side floorboards. These items are known to be associated with drug activity according to Deputy Frazier's training and experience.

{¶ 10} The state did not present any other evidence. Camp did not offer any evidence or call any witnesses.

B. The Trial Court's Decision.

{¶ 11} The trial court filed a judgment entry on May 14, 2014, granting Wehr's ***1122** motion to suppress the evidence. The trial court did not find any issue with the officer's contact with Wehr or the subsequent pat down of Wehr for officer safety. The trial court found that the incriminating nature of the object, in this case an Advil bottle, was not immediately apparent to Deputy Frazier and, therefore, he was not justified in removing the bottle from the Appellee's person and opening it.

Assignment of Error

{¶ 12} The state raises one assignment of error,

{¶ 13} "I. THE TRIAL COURT ERRED WHEN IT GRANTED THE APPELLEE'S MOTION TO SUPPRESS."

Analysis

{¶ 14} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside,* 100 Ohio St.3d 152, 154–155, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. When ruling on a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and to evaluate witness credibility. See *State v. Dunlap,* 73 Ohio St.3d 308, 314, 652 N.E.2d 988 (1995); *State v. Fanning,* 1 Ohio St.3d 19, 20, 437 N.E.2d 583 (1982). Accordingly, a reviewing court must defer to the trial court's factual findings if competent, credible evidence exists to support those findings. See *Burnside,* supra; *Dunlap,* supra; *State v. Long,* 127 Ohio App.3d 328, 332, 713 N.E.2d 1 (4th Dist.1998); *State v. Medcalf,* 111 Ohio App.3d 142, 675 N.E.2d 1268 (4th Dist.1996). However, once this Court has accepted those facts as true, it must independently determine as a matter of law whether the trial court met the applicable legal standard. See *Burnside,* supra, citing *State v. McNamara,* 124 Ohio App.3d 706, 707 N.E.2d 539 (4th Dist 1997); See, generally, *United States v. Arvizu,* 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002); *Ornelas v. United States,* 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). That is, the application of the law to the trial court's findings of

fact is subject to a *de novo* standard of review *Ornelas,* supra. Moreover, due weight should be given "to inferences drawn from those facts by resident judges and local law enforcement officers." *Ornelas,* supra at 698, 116 S.Ct. at 1663.

Deputy Frazier's Initial Contact with Wehr.

{¶ 15} Contact between police officers and the public can be characterized in three different ways. *State v. Richardson,* 5th Dist. Stark No. 2004CA00205, 2005-Ohio-554, 2005 WL 332804, ¶ 23–27. The first is contact initiated by a police officer for purposes of investigation. "[M]erely approaching an individual on the street or in another public place [,]" seeking to ask questions for voluntary, uncoerced responses, does not violate the Fourth Amendment. *United States v. Flowers,* 909 F.2d 145, 147 (6th Cir.1990). The United State Supreme Court "[has] held repeatedly that mere police questioning does not constitute a seizure." *Florida v. Bostick,* 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991); *see also INS v. Delgado,* 466 U.S. 210, 212, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984). "[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage." *Bostick,* 501 U.S. at 434–435, 111 S.Ct. 2382 (citations omitted).

> The person approached, however, need not answer any question put to him, and may continue on his way. *Florida v. Royer* (1983), 460 U.S. 491, 497–98 [103 S.Ct. 1319, 75 L.Ed.2d 229]. Moreover, he may not be detained even momentarily for his refusal to listen or ***1123** answer. *Id.* So long as a reasonable person would feel free "to disregard the police and go about his business," *California v. Hodari D.,* 499 U.S. 621, 628, 111 S.Ct. 1547, 1552, 113 L.Ed.2d 690 (1991), the encounter is consensual and no reasonable suspicion is required.

Bostick, 501 U.S. at 434, 111 S.Ct. 2382, 115 L.Ed.2d 389.

{¶ 16} The second type of contact is generally referred to as "a *Terry* stop" and is predicated upon reasonable suspicion. *Richardson, supra; Flowers,* 909 F.2d at 147; *See Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). This temporary detention, although a seizure, does not violate the Fourth Amendment. Under the *Terry* doctrine, "certain seizures are justifiable ... if there is articulable suspicion that a person has committed or is about to commit a crime" *Florida,* 460 U.S. at 498, 103 S.Ct. 1319. In holding that the police officer's actions were reasonable under the Fourth Amendment, Justice Rehnquist provided the following discussion of the holding in *Terry,*

> In *Terry* this Court recognized that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. The Fourth Amendment does not require a police officer who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

Adams v. Williams, 407 U.S. 143, 145–47, 92 S.Ct. 1921, 1923–24, 32 L.Ed.2d 612 (1972).

{¶ 17} The third type of contact arises when an officer has "probable cause to believe a crime has been committed and the person stopped committed it." *Richardson,* 2005-Ohio-554, 2005 WL 332804, ¶ 27; *Flowers,* 909 F.2d at 147. A warrantless arrest is constitutionally valid if:

> "[a]t the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the * * * [individual] had committed or was committing an offense."

State v. Heston, 29 Ohio St.2d 152, 155–156, 280 N.E.2d 376 (1972), quoting *Beck v. Ohio,* 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964). "The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause." *Ornelas v. United States,* 517 U.S. 690, 696, 116 S.Ct. 1657, 1661–1662, 134 L.Ed.2d 911 (1996). A police officer may draw inferences based on his own experience in deciding whether probable cause exists. *See, e.g., United States v. Ortiz,* 422 U.S. 891, 897, 95 S.Ct. 2585, 2589, 45 L.Ed.2d 623 (1975).

{¶ 18} The Ohio Supreme Court has held that a police officer's statement "Hey, come here a minute," while nominally ***1124** couched in the form of a demand, is actually a request that a citizen is free to regard or to disregard. *State v. Smith,* 45 Ohio St.3d 255, 258–259, 544 N.E.2d 239, 242 (1989), *reversed sub nom. Smith v. Ohio,* 494 U.S. 541, 110 S.Ct. 1288, 108 L.Ed.2d 464 (1990); *State v. Crossen,* 5th Dist. Ashland No. 2010–COA–027, 2011-Ohio-2509, 2011 WL 2040797, ¶ 13.

{¶ 19} Upon review, under the totality of the circumstances, we conclude the events in the case sub judice constituted a consensual encounter such that the Fourth Amendment was not implicated. *United States v. Mendenhall,* 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). In this case, the officer approached a parked vehicle and engaged in conversation with the driver after a passenger in the driver's vehicle ran from the vehicle. Deputy Frazier testified he was concerned that a crime may have taken place or that the driver was otherwise in need of assistance.

***Terry* pat-down of Wehr.**

{¶ 20} Authority to conduct a pat down search does not flow automatically from a lawful stop and a separate inquiry is required. *Terry v. Ohio,* 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The Fourth Amendment requires an officer to have a "reasonable fear for his own or others' safety" before frisking. *Id.* Specifically, "[t]he officer ... must be able to articulate something more than an 'inchoate and unparticularized suspicion or hunch.' " *United States v. Sokolow,* 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989), *citing Terry, supra,* 392 U.S. at 27, 88 S.Ct. 1868. Whether that standard is met must be determined from the standpoint of an objectively reasonable police officer, without reference to the actual motivations of the individual officers involved. *United States v. Hill,* 131 F.3d 1056, 1059 (D.C.Cir.1997), *citing Ornelas v. United States,* 517 U.S. 690, 696, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996).

{¶ 21} When Deputy Frazier approached the car, the passenger exited the vehicle and ran. Wehr immediately began digging around the floorboard area of the car. Weir ignored several requests by Deputy Frazier to stop and to show his hands. Under the totality of the circumstances, a reasonable officer could believe that Wehr may have been reaching for a weapon. *State v. Shrewsbury,* 4th Dist. Ross. No. 13CA3402, 2014-Ohio-716, 2014 WL 812428, ¶ 26. In *Adams v. Williams,* 407 U.S. 143, 148, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), a case also involving a *Terry* stop, the officer ordered the defendant to step out of the car so he could see the defendant's movements more clearly. *Id.* The defendant ignored the officer's order, and this provided ample reason for the officer to fear for his safety. *Id.*

{¶ 22} In the case at bar, we find under the totality of the circumstances the pat down in of Wehr was lawful because a reasonably prudent person in this situation would have been justified to believe his safety was compromised.

Removal of the pill bottle from Wehr's sock.

{¶ 23} The permissible scope of a *Terry* search is "a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." *Terry v. Ohio,* 392 U.S. 1, 27, 88 S.Ct. 1868, 1883, 20 L.Ed.2d 889, 909 (1968). "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence." ***1125** *State v. Evans,* 67 Ohio St.3d 405, 408, 618 N.E.2d 162, 166 (1993), *citing Adams v. Williams,* 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612, 617 (1972).

{¶ 24} Although *Terry* limits the scope of the search to weapons, the discovery of other contraband during a *Terry* search will not necessarily preclude its admissibility. In *Minnesota v. Dickerson,* 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993), the United States Supreme Court adopted the "plain feel" doctrine as an extension of the "plain view" doctrine. The Supreme Court stated,

> 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.

Dickerson, 508 U.S. at 375–376, 113 S.Ct. 2130, 124 L.Ed.2d 334. *Accord, State v. Evans,* 67 Ohio St.3d 405, 414, 618 N.E.2d 162 (1993), paragraph two of the syllabus.

{¶ 25} In the case at bar, Deputy Frazier testified that it was immediately apparent that the object concealed in Wehr's sock was a pill bottle. It is unusual for a person to carry a pill bottle concealed in one's sock. Coupled with the flight of the passenger upon the approach of the police cruiser, Wehr's reaching and fidgeting with something near the floorboard of his car, and Wehr's assertion that he did not know what was in the Advil bottle, we find the removal of the pill bottle from Wehr's sock to permissible.

Deputy Frazier's opening of the pill bottle.

{¶ 26} The Fourth Amendment to the United States Constitution, and Article I, Section 14 of the Ohio Constitution proscribes, except in certain well-defined circumstances, the search of property unless accomplished pursuant to a judicial warrant issued upon probable cause. *See, e.g., Skinner v. Railway Labor Executives' Assn.,* 489 U.S. 602, 619, 109 S.Ct. 1402, 1414, 103 L.Ed.2d 639 (1989); *Mincey v. Arizona,* 437 U.S. 385, 390, 98 S.Ct. 2408, 2412, 57 L.Ed.2d 290 (1978); *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967). That guarantee protects alike the "traveler who carries a tooth brush and a few articles of clothing in a paper bag," and "the sophisticated executive with the locked attaché' case." *United States v. Ross,* 456 U.S. 798, 822, 102 S.Ct. 2157, 2171, 72 L.Ed.2d 572 (1982). *Smith v. Ohio,* 494 U.S. 541, 543, 110 S.Ct. 1288, 108 L.Ed.2d 464 (1990). Many a closed container is accessible; opening it requires justification. *See United States v. Chadwick,* 433 U.S. 1, 14–15, 97 S.Ct. 2476, 2485, 53 L.Ed.2d 538 (1977).

{¶ 27} This Court has observed,

> If an object is in a closed container, the object "is not in plain view and the container may not be opened unless the packing gives away the contents." Katz [Ohio Arrest, Search and Seizure (1997 Ed.) 214, Section 13.01] at 221, *citing United States v. Williams* (1994), 41 F.3d 192, *certiorari denied* (1995), 514 U.S. 1056, 115 S.Ct. 1442, 131 L.Ed.2d 321.

State v. Smith, 5th Dist. Stark No. 1998CA00322, 1999 WL 744168(June 21, 19990) at *3. The Ohio Supreme Court has held that "[t]he 'immediately apparent' requirement of the 'plain view' doctrine is satisfied when police have probable cause to associate an object with criminal activity." *State v. Halczyszak,* 25 Ohio St.3d 301, 496 N.E.2d 925, paragraph three of ***1126** the syllabus (1986); *see Arizona v. Hicks,* 480 U.S. 321, 326, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987). "In ascertaining the required probable cause to satisfy the 'immediately apparent' requirement, police officers may rely on their specialized knowledge, training and experience [.]" *Halczyszak,* 25 Ohio St.3d 301, 496 N.E.2d 925 at paragraph four of the syllabus. The United States Supreme Court has also explained that, in the context of determining whether contraband is in plain view, "probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief,' that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false." *Texas v. Brown,* 460 U.S. 730, 742, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) (*quoting Carroll v. United States,* 267 U.S. 132, 162, 45 S.Ct. 280, 69 L.Ed. 543 (1925)). "A 'practical, nontechnical' probability that incriminating evidence is involved is all that is required." *Id.* (*quoting Brinegar v. United States,* 338 U.S. 160, 176, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949)); *State v. Smith,* 5th Dist. Stark No. 1998CA00322, 1999 WL 744168; *State v. Lorenzo,* 9th Dist. Summit No. 26214, 2012-Ohio-3145, 2012 WL 2832902, ¶ 4. Probable cause to associate an object with criminal activity does not demand certainty in the minds of police, but instead merely requires that there be "a fair probability" that the object they see is illegal contraband or evidence of a crime. *State v. George,* 45 Ohio St.3d 325, 544 N.E.2d 640 (1989), paragraph one of the syllabus.

{¶ 28} In the case at bar, Deputy Frazier had probable cause to search the container based upon the suspicious location where Wehr was storing the container, the flight of the passenger from the automobile, Wehr's reaching around toward the floorboard area of the car, his refusal to show his hands and Wehr's assertion that he did not know what was inside the Advil bottle. In the case at bar, the container was within the automobile at the time Deputy Frazier initiated his conversation with Wehr and had he not discovered it, it would have left the scene with Wehr.

{¶ 29} Under the totality of the circumstances and given the information known to Deputy Frazier at the time of the search, the evidence supports a finding that Deputy Frazier had probable cause to associate the Advil bottle with criminal activity. Therefore, Deputy Frazier had probable cause to open the Advil bottle.

{¶ 30} Accordingly, Deputy Frazier's search of the Advil bottle did not violate Wehr's rights under the Fourth

Amendment, and the court erred in granting Wehr's motion to suppress.

Conclusion

{¶ 31} We find that the trial court incorrectly decided the ultimate or final issue raised in Wehr's motion to suppress, and further that the trial court failed to apply the appropriate test or correct law to the findings of fact. *State v. Curry,* 95 Ohio App.3d 93, 96, 641 N.E.2d 1172 (8th Dist.1994); *State v. Claytor,* 85 Ohio App.3d 623, 627, 620 N.E.2d 906 (4th Dist.1993); *State v. Guysinger,* 86 Ohio App.3d 592, 594, 621 N.E.2d 726 (4th Dist.1993); *State v. Bickel,* 5th Dist. Ashland No. 2006–COA–034, 2007-Ohio-3517, 2007 WL 2009679, ¶ 32.

{¶ 32} We find that Deputy Frazier had probable cause to associate the container with criminal activity and his seizure and search of the container was justified under the plain-view doctrine.

{¶ 33} For the forgoing reasons, the judgment of the Richland County Court of ***1127** Common Pleas, Ohio is reversed and this case is remanded for further proceedings consistent with this opinion.

FARMER, J., and WISE, J., concur.

All Citations

20 N.E.3d 1116, 2014 -Ohio- 4396

690 F.3d 226
United States Court of Appeals,
Fourth Circuit.

UNITED STATES of America, Plaintiff–Appellee,

v.

Earl Whittley DAVIS, a/k/a Baby Earl, a/k/a E, Defendant–Appellant.

No. 09–4890.
|
Argued: Dec. 9, 2011.
|
Decided: Aug. 16, 2012.

Synopsis

Background: Following denial of his motion to suppress, 657 F.Supp.2d 630, defendant was convicted in the United States District Court for the District of Maryland, Roger W. Titus, J., of Hobbs Act robbery, possession and discharge of firearm in furtherance of crime of violence, possession and discharge of firearm in furtherance of crime of violence resulting in death, and carjacking, and he appealed.

Holdings: The Court of Appeals, Agee, Circuit Judge, held that:

officer's seizure of defendant's clothing fell within scope of plain view exception to warrant requirement;

extraction of DNA sample from defendant's clothing and creation of his DNA profile constituted "search";

extraction of defendant's DNA sample from his clothing and creation of his DNA profile for testing in murder investigation constituted unreasonable searches;

use of defendant's DNA profile to identify him as perpetrator fell within scope of good faith exception to exclusionary rule; and

court did not abuse its discretion in excluding expert testimony regarding lineup procedure and unreliability of eyewitness testimony.

Affirmed.

Davis, Circuit Judge, dissented and filed opinion.

Attorneys and Law Firms

***228 ARGUED:** Paresh S. Patel, Office of the Federal Public Defender, Greenbelt, Maryland, for Appellant. Deborah A. Johnston, Office of the United States Attorney, Greenbelt, Maryland, for Appellee. **ON BRIEF:** James Wyda, Federal Public Defender, Baltimore, Maryland, for Appellant. Rod J. Rosenstein, United States Attorney, Baltimore, Maryland, Emily N. Glatfelter, Assistant United States Attorney, Office of the United States Attorney, Greenbelt, Maryland, for Appellee.

Before AGEE, DAVIS, and KEENAN, Circuit Judges.

Affirmed by published opinion. Judge AGEE wrote the majority opinion, in which Judge KEENAN joined. Judge DAVIS wrote a dissenting opinion.

OPINION

AGEE, Circuit Judge:

A jury convicted Earl Whittley Davis of various federal offenses arising from a course of conduct that included the armed robbery and murder during that robbery of an armored car employee, Jason Schwindler, as well as a subsequent carjacking.[1] On appeal, Davis challenges the ***229** use of DNA evidence against him at trial, and also argues that the district court erred in excluding expert testimony proffered by Davis in an attempt to undermine an eyewitness identification of him. For the reasons set forth below, we affirm the judgment of the district court.

I.

All of Davis' convictions arose from the same brief course of events occurring in Prince George's County, Maryland. The district court accurately summarized the facts as follows:

> On August 6, 2004, shortly before 1:00 p.m., Jason Schwindler, an armored car employee, picked up a bank

> deposit from a local business and took it to a nearby BB & T bank in Hyattsville, Maryland. As Schwindler walked up to the bank entrance, two [gunmen] exited a Jeep Cherokee and began shooting at Schwindler, killing him. When their escape in the Jeep was thwarted by the armored truck driver, the assailants carjacked a bank customer and fled in her vehicle[, a Pontiac Grand Am, which] was later recovered.

United States v. Davis, 657 F.Supp.2d 630, 635 (D.Md.2009).

After the murder, officers from the Prince George's County Police Department ("PGCPD") responded to the scene and collected numerous items of evidence, including a baseball cap worn by one of the shooters, two firearms, ammunition, and the steering wheel covers from the Jeep Cherokee and the Grand Am. After swabbing and analyzing the items for DNA, the profiles of the major contributors to the DNA found in the ball cap and on the triggers and grips of the recovered firearms were entered into the local Combined DNA Index System ("CODIS") database.[2] A search of the local database led to a "cold hit" between the DNA recovered at the Schwindler murder scene and Davis' DNA profile, which was already present in the local database.

Based on the "cold hit," officers obtained a search warrant to obtain a sample of Davis' DNA directly from him, which again matched the evidence from the Schwindler murder scene. Evidence of this second match was introduced at trial in this case.

Prior to trial, Davis filed a motion to suppress the use of all DNA evidence against him, arguing that his DNA profile had been obtained by police and entered into the local PGCPD DNA database in violation of his Fourth Amendment rights. The district court held an evidentiary hearing, but declined to rule on the motion to suppress immediately, instructing the parties to continue preparing for trial. After a jury found Davis guilty of the charges, the district court issued a lengthy written order denying the motion to suppress. *Davis,* 657 F.Supp.2d 630–67. Davis was sentenced by the district court on September 18, 2009 to a term of life imprisonment plus 420 months.[3]

Davis noted a timely appeal, and we have jurisdiction pursuant to 28 U.S.C. § 1291.

***230** II.

Background and Proceedings Below

On August 29, 2000, almost four years before the Schwindler murder, Davis arrived at Howard County General Hospital with a gunshot wound to his leg. He claimed to be a robbery victim and reported that he had been shot by the purported robber. Hospital personnel called the police, as Maryland law required, and Patrol Officer Joseph King of the Howard County, Maryland, Police Department ("HCPD") responded to the call.[4] Officer King found Davis lying on a bed in the emergency room. He was conscious, sitting up, and able to converse with Officer King at the time. Davis' pants and boxer shorts had been removed by hospital personnel and placed in a plastic hospital bag, which was stored on a shelf beneath the bed. Officer King observed Davis' gunshot wound and secured Davis' pants and boxer shorts as evidence of the reported shooting. He did so without express permission from Davis (although Davis saw him take the clothing) and without a warrant. He then gave those items to his colleague, Detective Steven Lampe, who placed them in the HCPD "property room," to be held as evidence in the prosecution of Davis' assailant.

At the suppression hearing, Officer King testified that he could not recall exactly what the bag looked like containing Davis' clothes, and neither could Detective Lampe, except that the bag was "plastic." (J.A. 166.) Officer King testified, however, that he had "responded to the hospital on numerous calls," that he knew it was the hospital's "practice to secure any property" taken from a patient and that the hospital placed that "[c]lothing from a victim ... under [the patient's] bed." (J.A. 147.) He also testified that he did not need "permission from anyone in the hospital to access" the bag. (J.A. 150.)

No one was ever charged in the August 2000 shooting of Davis, and neither his clothing nor the blood on it were ever tested in connection with that shooting. Davis was not contacted or advised that the shooting investigation was no longer being pursued by the HCPD, nor was he offered the opportunity to retrieve his clothing. Instead, Davis' clothes, containing his DNA material,[5] were simply retained by the HCPD.

In order to give a more complete picture of later events, we note certain additional facts concerning Davis' hospital stay. First, although Davis had given a false name and false driver's license upon his admission to the hospital, police

later learned his true identity through fingerprinting analysis. Additionally, from the beginning of their questioning of Davis, Officer King and Detective Lampe believed Davis was being uncooperative so they conducted further investigation. That investigation led to the discovery of marijuana in the vehicle in which Davis had arrived at the hospital, as well as several other potentially incriminating items, such as a t-shirt and a ball cap that said "FBI," a handheld radio, leg shackles, gloves, and a mask. As a result, Davis was arrested on drug charges upon his ***231** release from the hospital, but those charges were later dropped.

The government does not dispute that Davis' clothing was seized initially because it was evidence of a crime in which he was a victim. The clothing was logged into the HCPD property room, however, on the same sheet with the marijuana found in the car and the false ID card Davis had presented. It also was Davis' arrest record on the drug offense that later led the PGCPD to inquire and learn about the existence of the seized clothing. *Davis,* 657 F.Supp.2d at 634–35 (noting that in April 2004, Lampe "was contacted by members of [PGCPD], who asked him questions about the arrest of Earl Davis in 2000."). When the clothing was later checked out to the PGCPD for testing in a subsequent murder investigation, however, the form indicated that the clothes and blood were from the victim of a shooting. In effect, then, Davis had a "dual status" throughout the events in this case—he was both victim and arrestee—a fact which becomes important when analyzing his Fourth Amendment claims.

In June 2001, an individual named Michael Neal was murdered in Prince George's County. In April 2004, a PGCPD homicide detective investigating the Neal murder, Detective K. Jernigan, learned that Davis had previously been arrested in Howard County and that the HCPD had Davis' clothes. The PGCPD suspected Davis was involved in the Neal murder.[6] As a result, they requested and obtained Davis' clothing, without a warrant, from the HCPD.

In June 2004, the PGCPD extracted Davis' DNA from the blood stains on Davis' pants, again without a warrant, and created a DNA profile from the test results. That DNA was compared to an unknown DNA sample recovered from the scene of the Neal homicide, but there was no match. Despite the fact that Davis' DNA profile excluded him as the source of the evidentiary sample from the Neal murder, the PGCPD nonetheless retained his DNA profile, and approximately one week later, included it in their local DNA database.

At a hearing before a Maryland state court in its Schwindler murder prosecution,[7] which is part of the record before us, the DNA analyst for the PGCPD, Julie Kempton, testified concerning the extraction of Davis' profile and its entry into the local database. She testified that she was told by a detective that the boxer shorts were taken "from a suspect, from a hospital emergency room where he had been brought in [she] believe[d] for a shooting[.]" (Supp. J.A. 93.) She further testified that her testing ultimately excluded Davis' profile as a match in the Neal homicide. (Supp. J.A. 93–94.) She also testified that she knew that, at the state level of the CODIS database, a suspect's profile should be deleted if the court ordered expungement based on a vacated conviction. The record does not disclose any ***232** other information as to why the profile was retained, whether that was a common policy or practice, or whether it violated any local rule, regulation, policy, or practice to do so.[8]

As noted earlier, in the course of the investigation of the robbery and murder of Mr. Schwindler, when the DNA profile recovered from the Schwindler crime scene was entered into the PGCPD DNA database, a "cold hit" resulted with the DNA sample that had been lifted from Davis' clothing. The PGCPD then secured a search warrant to obtain a DNA sample directly from Davis. That subsequent DNA profile of Davis also matched the DNA samples from the Schwindler crime scene.

Evidence of the match between the known sample obtained via the search warrant and the crime scene evidence was introduced at Davis' trial. Specifically, DNA analyst Sarah Chenoweth testified that Davis' DNA matched DNA profiles from the baseball cap and both cars' steering wheel covers, and testified as to the infinitesimally small probabilities that the DNA on those items came from any person other than Davis.[9]

Davis moved to suppress the DNA evidence against him, arguing that it was obtained in violation of the Fourth Amendment. In a lengthy order denying suppression, the district court addressed each of Davis' challenges. The court concluded that Davis' Fourth Amendment rights were violated only when his DNA profile was retained in the local DNA database, after Davis' profile did not match the DNA sample from the Neal murder, but found no other violations. As to the retention of Davis' profile, the court concluded that the "good faith" exception should be applied and thus the application of the exclusionary rule was not warranted.

III.

Davis' Challenge to the DNA Evidence

Davis alleges three separate Fourth Amendment violations regarding the collection and retention of his DNA. Specifically, Davis asserts that each of the following actions by police constituted a Fourth Amendment violation: (1) the seizure of his clothing from the hospital room and its subsequent search; (2) the extraction of his DNA profile and testing in connection with the Neal murder investigation; and (3) the retention of his DNA profile in the local DNA database.[10]

For the reasons discussed below, we agree with the district court that no Fourth Amendment violation occurred in the seizure of the bag containing Davis' clothing at the hospital. We also agree that any subsequent "search" of the bag was not unlawful because its contents were a foregone conclusion, based in part on Officer King's uncontradicted testimony that he saw "a bag underneath of [Davis'] hospital bed that contained clothing."[11] We further determine that there was a ***233** Fourth Amendment violation when the PGCPD extracted Davis' DNA profile from his clothing and tested it as part of the Neal murder investigation. We assume, without deciding, that there was a separate Fourth Amendment violation in retaining Davis' DNA profile in the local CODIS database. Finally, we conclude that the "good faith exception" to the exclusionary rule applies here to both violations and thus the DNA evidence was not required to be excluded.

We review the factual findings underlying a motion to suppress for clear error and the district court's legal determinations de novo. *Ornelas v. United States,* 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); *United States v. Rusher,* 966 F.2d 868, 873 (4th Cir.1992). When a suppression motion has been denied, this Court reviews the evidence in the light most favorable to the government. *United States v. Seidman,* 156 F.3d 542, 547 (4th Cir.1998).

A.

The Seizure of Davis' Clothing in His Hospital Room

Davis first argues that the seizure of his clothing from his hospital room constituted a warrantless seizure that was not justified by any exception to the warrant requirement. The government contends that both the seizure and the subsequent search of the bag containing the clothing were justified by the "plain view" exception, as the district court concluded.[12]

For the plain view exception to the warrant rule to apply, the government must show that: (1) the officer was lawfully in a place from which the object could be viewed; (2) the officer had a "lawful right of access" to the seized items; and (3) the incriminating character of the items was immediately apparent. *See United States v. Jackson,* 131 F.3d 1105, 1109 (4th Cir.1997). Davis concedes that Officer King was lawfully in the hospital room and thus that the government has satisfied the first requirement, but argues that the government failed to satisfy the latter two requirements. We disagree.

As to the second requirement, Davis contends that, even though Officer King was in the room lawfully, he did not have lawful access to the bag of clothing. The case most heavily relied upon by Davis, ***234** *United States v. Neely,* 345 F.3d 366 (5th Cir.2003), is inapposite. In *Neely,* the Fifth Circuit held the plain view doctrine did not allow the seizure of the patient's clothing, because the clothing at issue was not in open view but in the hospital property storage room, and required permission from hospital personnel to retrieve it. *Id.* at 368, 371. Notably, the hospital patient in *Neely* was the suspect in a criminal investigation, not the victim of a crime like Davis. *Id.* at 367–68.

Neely aside, we have no difficulty finding that there was lawful access to the clothing here. As suggested in *Horton v. California,* 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990), the lawful access requirement is intended to clarify that police may not enter a premises to make a warrantless seizure, even if they could otherwise see (from a lawful vantage point) that there was contraband in plain sight. *Id.* at 137 & n. 7, 110 S.Ct. 2301 (describing the second requirement and explaining that even if "[i]ncontrovertible testimony of the senses" establishes that an object in plain view is contraband, "the police may not enter and make a warrantless seizure"); *see also Boone v. Spurgess,* 385 F.3d 923, 928 (6th Cir.2004) (the "lawful right of access" requirement "is meant to guard against warrantless entry onto premises whenever contraband is viewed from off the premises in the absence of exigent circumstances"; thus, while "lawfully positioned" "refers to where the officer stands when she sees the item," "lawful right of access" refers "to where she must be to

retrieve the item"). The example given by the government in this case is apt, *i.e.,* the analysis of the first and second prongs might be different if "the officer were lawfully present outside a building, peering through a window into a room in which he would not be lawfully present." (Appellee's Br. 32 n. 8.) Here, however, there is no dispute that Officer King was lawfully present in the hospital room, and he thus had lawful access in the ordinary course of his investigation to the bag of clothing which could be evidence against Davis' assailant.[13] *See Washington v. Chrisman,* 455 U.S. 1, 8, 102 S.Ct. 812, 70 L.Ed.2d 778 (1982) ("when a police officer, for unrelated but entirely legitimate reasons, obtains lawful access to an individual's area of privacy ...[,] the Fourth Amendment does not prohibit seizure of evidence of criminal conduct found in these circumstances."); *see also infra* at 237–38 (discussing cases permitting seizure of blood-stained clothing in plain view).

The third prong of the plain view doctrine is less readily resolved. Nonetheless, having carefully reviewed the district court's ruling on this point, we find no clear error in its factual findings, nor any error in its legal conclusions.

Davis' primary argument is that while the bag may have been in plain view, the clothes were not. Thus, he contends that both the seizure and any subsequent search of the bag violated his constitutional rights. The seizure implicated Davis' possessory interest in his clothing, and any subsequent search implicated his privacy interest. *See* ***235** *Texas v. Brown,* 460 U.S. 730, 747, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) (Stevens, J., concurring in the judgment). As Davis' arguments on this issue acknowledge, under the facts here, the two concepts overlap. Specifically, the seizure of the bag was warranted under the plain view exception only if it was immediately apparent that it contained incriminating evidence. Here, that would require it be immediately apparent that the bag contained evidence of a crime, *i.e.,* Davis' clothing possessing blood, trace evidence, and/or a bullet hole. Similarly, the subsequent search of the bag (whether to identify or examine its contents), was warranted if it was a foregone conclusion that the bag contained the clothing, which was evidence of a crime.

As to both the seizure of the bag and any subsequent search of the bag, the district court's reliance on *United States v. Williams,* 41 F.3d 192 (4th Cir.1994) was appropriate. In *Williams,* officers had properly seized five packages, which consisted of a brown, opaque material wrapped in heavy cellophane. *Id.* at 197–98. The defendant challenged the subsequent warrantless search, in which a police officer removed the cellophane wrapping from one of the packages, poked a hole in the opaque material surrounding its contents, removed a small quantity of white powder and field tested the powder, which tested positive for cocaine. *Id.* at 194.

The *Williams* Court explained that a search of such a container is permissible under the plain view doctrine when "the contents of a seized container are a foregone conclusion." *Id.* at 197. That is, "when a container is not closed, or transparent, or when its distinctive configuration proclaims its contents, the container supports no reasonable expectation of privacy and the contents can be said to be in plain view." *Id.* (citations omitted). *Williams* clearly stated that, "[i]n determining whether the contents of a container are a foregone conclusion, the circumstances under which an officer finds the container may add to the apparent nature of its contents." *Id.* (citing *Blair v. United States,* 665 F.2d 500, 507 (4th Cir.1981)).

Williams also quite plainly allows the experience of the officer to be taken into account when determining whether a container's contents are a "foregone conclusion." *Id.* at 198. There, the Court relied on the testimony of the police officer that, based on his ten years of experience, packages wrapped in this manner contained narcotics, to support the Court's holding that the contents of the container were a "foregone conclusion." *Id.* at 194, 198. The Court also noted that the other items found in the suitcase with the wrapped packages (towels, dirty blankets, and a shirt with a cigarette burn) were unusual for a traveler, in that they did not contain clothing or other items a person normally carries when traveling across the country. *Id.* Thus, in conducting this inquiry, we consider both the circumstances under which the container here was found and Officer King's knowledge about this particular hospital's practices and procedures and his experience in responding to the hospital bedsides of gunshot victims in this particular hospital.[14]

Here, Officer King testified, without contradiction or challenge, that when he entered the curtained-off area where he was told Davis would be, he saw Davis on a hospital bed and observed "a bag underneath of the hospital bed that contained ***236** clothing." (J.A. 140.) He did not testify that he walked into the area and saw what he *thought* might be a bag of clothing under the bed. Drawing the inferences from the facts in the government's favor, as we must, *see Seidman,* 156 F.3d at 547, that testimony fairly supports an inference that Officer King could see the clothing through the bag or

that the bag was partially open, revealing clothing. Nothing in the record contradicts such a conclusion. Because the officers were not asked whether the bag was open or closed and could not recall precisely what the bag looked like, however, we do not know for certain "whether the bag was open or closed, or whether it was transparent, opaque or somewhere in-between," *Davis,* 657 F.Supp.2d at 638.[15] What is clear from this record is that Officer King expressed no doubt he observed "a bag ... that contained clothing." (J.A. 140.) Thus, we disagree with the dissent's contention that Officer King's testimony was equivocal, or that his testimony fails to rise to the level of certainty required in *Williams. See post* at 274–75.[16]

Officer King also testified that it was the practice and procedure of the hospital to place a patient's clothing in a bag on the shelf under his bed. He further could visibly see that Davis had been shot in his upper right thigh, and that Davis was no longer wearing pants or underwear. Instead, while Davis was wearing clothing on his upper body, his lower body was exposed, except for his genital area, which was covered by a sheet. (*See* Supp. J.A. 73 (picture of Davis in hospital bed); J.A. 141 (testimony of Officer King that picture accurately depicted what Davis was wearing)).

We agree with the district court that "the totality of the circumstances, taking into account [Officer] King's experience with the hospital's practices regarding patients' property, the appearance of the Defendant at the time [Officer] King spoke with him, and the obvious fact that the Defendant had been shot in an area of the body usually covered by clothing" support the determination that it was a foregone conclusion the bag under Davis' hospital bed contained the clothing he wore when he was shot.

Davis alternatively contends that even if it had been a virtual certainty that the bag contained Davis' clothing, the incriminating nature of those clothes was not "immediately apparent." We have little trouble, however, in concluding that Davis' pants almost certainly would contain both blood and a bullet hole,[17] and would thus ***237** be incriminating evidence in the prosecution of the shooter. Such a conclusion is based on the circumstances, Davis' appearance, and the location of his bullet wound. As noted by the district court, moreover, Davis has provided no authority to support imposing a requirement that the evidence be incriminating against the person from whom it is seized. *Davis,* 657 F.Supp.2d at 640. As the district court reasoned:

> [The defendant's failure to provide any authority] may be due to the unique situation presented by the facts of this case; very rarely will a victim from whom evidence is seized later become a criminal defendant with standing and reason to challenge the previous seizure. As a matter of first impression, however, it would seem unwise and overly restrictive to require police to know who will be incriminated by an item in plain view before they are able to seize it and investigate further.
>
> *Id.*

Indeed, Supreme Court cases and authority from other circuits explain that an item need not itself be contraband before it has an "incriminating nature," but instead, an item need only be evidence of a crime. *Texas v. Brown,* 460 U.S. 730, 742, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) (Rehnquist, J., plurality opinion) (discussing plain view doctrine and whether items may be "contraband or stolen property or *useful as evidence of a crime* ") (emphasis added); *United States v. Smith,* 459 F.3d 1276, 1293 (11th Cir.2006) ("the scope of the 'plain view' doctrine extends to the seizure of items that, while not contraband themselves, may be used as evidence against a defendant"); *United States v. Rodriguez,* 601 F.3d 402, 407 (5th Cir.2010) ("The incriminating nature of an item is 'immediately apparent' if the officers have 'probable cause' to believe that the item is either *evidence of a crime* or contraband.") (emphasis added and citation omitted); *United States v. Chipps,* 410 F.3d 438, 443 (8th Cir.2005) (warrantless seizure of a sweatshirt on the ground outside a house where there had been a reported assault was justified by the plain view doctrine, since "the incriminating nature of a bloody sweatshirt at the site of a potential assault was obvious" and the officer "had a legal right to access the shirt —it was right in front of him on the ground"); *Chavis v. Wainwright,* 488 F.2d 1077, 1078 (5th Cir.1973) (clothing in plastic hospital bag was properly seized from stabbing victim in hospital without a warrant as evidence of an assault, despite fact that victim told police he did not want to prosecute his assailant girlfriend).[18] Here, like the bloody clothing in *Chipps* and in *Chavis,* the pants with a bullet hole, which would be clear evidence a shooting occurred ***238** and might reasonably provide scientific evidence related to the gun caliber, distance, etc., is evidence of a crime and hence, has an immediately apparent "incriminating nature."[19]

For all of the foregoing reasons, we conclude that the plain view doctrine justified both the warrantless seizure and the subsequent search of the bag containing the clothing under Davis' hospital bed.

Before turning to the issues surrounding the extraction and testing of Davis' DNA, we respond briefly to two points raised by the dissent regarding the seizure and search of the clothing and our application of *Williams.* First, the dissent argues *Williams* is distinguishable on the grounds that the district court here considered *only* extrinsic evidence, while the *Williams* court considered such extrinsic evidence in addition to the physical appearance and character of the container. Relatedly, the dissent further states, without citation to authority, that "[n]arcotics packaging is so readily recognizable as to rise to the level of the archetypal kit of burglar tools or a gun case," while the bag here was not ***239** "distinctive in any way." *Post* at 274–75, 275. We disagree.

The dissent's assertions that drug packaging is "readily recognizable" as such while a bag containing a hospital patient's clothing is not, is true only if the contextual evidence present in *Williams* is being taken into account, *i.e.,* the fact that the packaging was in a suitcase with very few other items one would suspect to find in a traveler's luggage, and the contextual evidence here is ignored, *i.e.,* that the bag was underneath a gunshot victim's hospital bed. But *Williams* expressly permits us to consider the context and circumstances of the specific case, as well as the experience of the officer. Here, those factors compel the conclusion that the bag under Davis' bed contained his clothing.[20]

Second, the dissent suggests an inconsistency between our upholding the seizure of Davis' clothing at the hospital (which obviously contained his DNA), but concluding that he had a reasonable expectation of privacy in his DNA such that its later use violated his Fourth Amendment rights. *See post* at 275–76 (it is "curious, to say the least, to reason as does the majority that Davis retained, for several years after the bag was seized at the hospital, a reasonable expectation of privacy in the character of his DNA molecules, but that he lacked any reasonable expectation of privacy in the presence of those molecules in his blood while they were embedded in his clothing" while at the hospital). This perceived inconsistency is based on a misunderstanding of our holding.

We do not hold that Davis had no expectation of privacy in his DNA while it was on his clothing at the hospital. What we conclude is that the seizure and search of the bag containing Davis' clothing were permitted under the plain view doctrine because his clothing was evidence of a crime and was in plain view, as applied in *Williams. See infra* at 244 ("while Davis may not have had any expectation of privacy in the outward appearance of the clothing once it was in police custody, we nevertheless must consider ... whether Davis retained a reasonable expectation of privacy in his DNA on the clothing or in the DNA profile obtained from it.")

Davis always had an expectation of privacy in his DNA, but that expectation of privacy was not implicated merely by an effort to identify, describe and catalogue his clothing as evidence of a reported crime, rather than testing anything found on it. It was not until the police sought to obtain a DNA profile from his blood that his privacy interest in his DNA was implicated. As we explain, the search of his DNA did not occur until the police extracted and tested his DNA in conjunction with the Neal murder. *See infra* at Section III.B.2. The dissent's perceived "inconsistency" in our holdings does not exist.[21]

***240** B.

The Extraction and Testing of Davis' DNA Profile for Use in the Neal Murder Investigation, and the Retention of Davis' DNA Profile

Having concluded that the HCPD lawfully obtained the clothing that contained Davis' DNA material, we now turn to Davis' contention that the PGCPD violated the Fourth Amendment by extracting his DNA from the blood on that clothing and testing it for use in the Neal murder investigation, as well as in retaining his profile in their local DNA database.

1.

General Fourth Amendment Principles

The general issue of a person's reasonable expectation of privacy in his DNA is a developing and unsettled area of the law, one that has not yet been addressed by the Supreme Court. The relative recency of the technology, especially when coupled with its potential power, is no doubt part of the reason why there is uncertainty over the degree of privacy persons can reasonably expect to have in their DNA. *Cf. Dist. Attorney's Office for the Third Judicial Dist. v. Osborne,* 557 U.S. 52, 129 S.Ct. 2308, 2316, 174 L.Ed.2d 38 (2009) ("Modern DNA testing can provide powerful new evidence unlike anything known before ... DNA testing has exonerated wrongly convicted people, and has confirmed the

convictions of many others."); *Jones v. Murray,* 962 F.2d 302, 307 (4th Cir.1992) (describing DNA as a "dramatic new tool for the law enforcement effort to match suspects and criminal conduct").[22]

***241** The Fourth Amendment provides that "[t]he 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." U.S. Const. amend. IV. However, the protections of the Fourth Amendment are activated only when the state conducts a search or seizure in an area in which there is a "constitutionally protected reasonable expectation of privacy." *New York v. Class,* 475 U.S. 106, 112, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986) (citation omitted). When there is no reasonable expectation of privacy, the Fourth Amendment is not implicated.[23] *See, e.g., United States v. Dionisio,* 410 U.S. 1, 14, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973) (no reasonable expectation of privacy in one's voice); *United States v. Mara,* 410 U.S. 19, 21, 93 S.Ct. 774, 35 L.Ed.2d 99 (1973) (no reasonable expectation of privacy in one's handwriting); *California v. Greenwood,* 486 U.S. 35, 37, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988) (same as to trash left by the curb). A search or seizure for Fourth Amendment purposes does not occur, therefore, when a person lacks a reasonable expectation of privacy in the material examined. *United States v. Breza,* 308 F.3d 430, 433 (4th Cir.2002) (citing *Illinois v. Andreas,* 463 U.S. 765, 771, 103 S.Ct. 3319, 77 L.Ed.2d 1003 (1983)).

Even if a search has occurred without a warrant and without individualized suspicion, a Fourth Amendment violation does not necessarily occur. The Fourth Amendment does not prohibit all searches, only those that are unreasonable. *Skinner v. Ry. Labor Execs.' Ass'n,* 489 U.S. 602, 619, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) ("the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable"); *Terry v. Ohio,* 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) ("[W]hat the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.") (quoting *Elkins v. United States,* 364 U.S. 206, 222, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960)). And "[a]lthough as a general matter, warrantless searches 'are *per se* unreasonable under the Fourth Amendment,' there are 'a few specifically established ***242** and well-delineated exceptions' to that general rule." *City of Ontario, Ca. v. Quon,* —— U.S. ——, 130 S.Ct. 2619, 2630, 177 L.Ed.2d 216 (2010) (quoting *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)); *Nat'l Treasury Employees Union v. Von Raab,* 489 U.S. 656, 665, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989) ("neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance").

2.

Whether Extraction and Testing of Davis' DNA Profile for Use in the Neal Murder Investigation, or its Later Retention, Constituted Searches?

We first consider the threshold question whether a search occurred when the PGCPD extracted and tested Davis' DNA for use in the Neal murder investigation, or when the PGCPD retained Davis' DNA profile in CODIS. Our analysis turns on the question whether Davis had a reasonable expectation of privacy in his clothing and the blood and DNA it contained, once it was in the lawful custody of the HCPD.

The government argues that there was no search or seizure here, relying primarily on *United States v. Edwards,* 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974), for the proposition that Davis lacked any reasonable expectation of privacy in his clothes or DNA after they were lawfully seized by police.[24] In *Edwards,* the defendant was arrested and charged with an attempted break-in at approximately 11:00 p.m., taken to the local jail and placed in a cell. 415 U.S. at 801, 94 S.Ct. 1234. Investigation at the scene revealed that the attempted entry had been made through a wooden window and that paint chips had been left on the window sill and wire mesh. *Id.* at 801–02, 94 S.Ct. 1234. The next morning (approximately ten hours after his arrest), Edwards was given a change of clothing and his clothing was then taken from him and held as evidence. *Id.* at 802, 94 S.Ct. 1234. Examination of the clothing revealed paint chips matching the samples taken from the window. *Id.* The evidence of the matching paint chips was later introduced at trial, over Edwards' objection. *Id.* The Sixth Circuit reversed, finding the seizure of the clothing, carried out after "the mechanics of [Edwards'] arrest" had been completed, violated the Fourth Amendment. *Id.*

The Supreme Court reversed the Sixth Circuit, holding that the warrantless seizure of the clothing was constitutional. The Supreme Court first noted that warrantless searches are

permitted incident to custodial arrests, and that they can legally be conducted later when the accused arrives at the place of detention. ***243** *Id.* at 802–03, 94 S.Ct. 1234. "Nor is there any doubt that clothing or other belongings may be seized upon arrival of the accused at the place of detention and later subjected to laboratory analysis or that the test results are admissible at trial." *Id.* at 803–04, 94 S.Ct. 1234.

The government reads *Edwards* to stand for the proposition that once the police have lawful custody of evidence, like Davis' clothing here, further scientific examination conducted on it by that particular police department or by any other law enforcement body does not first require that a search warrant be obtained. (*See* Appellee's Br. 46.) As a result, the government argues, Davis did not have a reasonable expectation of privacy in the DNA contained in his clothing because it had been lawfully seized by the HCPD. The government accordingly contends that the PGCPD did not violate the Fourth Amendment when the PGCPD later obtained Davis' clothing and extracted the DNA at issue.

The Court in *Edwards,* however, did not adopt the categorical rule advanced by the government:

> In upholding this search and seizure, *we do not conclude that the Warrant Clause of the Fourth Amendment is never applicable to postarrest seizures of the effects of an arrestee.* But we do think that the Court of Appeals for the First Circuit captured the essence of situations like this when it said in *United States v. DeLeo,* 422 F.2d 487, 493 (1970) (footnote omitted): "While the legal arrest of a person should not destroy the privacy of his premises, it does—for at least a reasonable time and to a reasonable extent—take his own privacy out of the realm of protection from police interest in weapons, means of escape, and *evidence.*"

415 U.S. at 808–09, 94 S.Ct. 1234 (footnote omitted and emphasis added); *id.* at 808 n. 9, 94 S.Ct. 1234 ("Holding the Warrant Clause inapplicable in the circumstances present here does not leave law enforcement officials subject to no restraints. This type of police conduct must still be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.") (internal quotation marks and alteration omitted).

In *Edwards,* the class of person whose item was seized, an arrestee, and the type of item seized, evidence, were material considerations in the Court's analysis. Further, *Edwards* recognized that even an arrestee, who has a diminished expectation of privacy, does not forfeit forever all privacy interests in his effects. Therefore, the *Edwards* decision itself does not support the government's broad categorical assertion that any item in the lawful custody of law enforcement can be subjected to laboratory analysis at any later time and for any purpose related to law enforcement.

Moreover, because the analysis of biological samples, such as those derived from blood, urine, or other bodily fluids, can reveal "physiological data" and a "host of private medical facts," such analyses may "intrude[ ] upon expectations of privacy that society has long recognized as reasonable." *Skinner,* 489 U.S. at 616–17, 109 S.Ct. 1402. Therefore, such analyses often qualify as a search under the Fourth Amendment. *Id.* at 618, 109 S.Ct. 1402 (concluding that "the collection and subsequent analysis of the requisite biological [blood and urine] samples must be deemed Fourth Amendment searches"). Similarly, an analysis required to obtain a DNA profile, like the chemical analysis of blood and urine at issue in *Skinner,* generally qualifies as a search, because an individual retains a legitimate expectation of privacy in ***244** the information obtained from the testing. *See, e.g., United States v. Mitchell,* 652 F.3d 387, 407 (3d Cir.2011) (en banc) (after discussing the Fourth Amendment search that occurs when a DNA sample is collected directly from a person's body, discussing separately "[t]he second 'search' at issue," which was, "of course, the processing of the DNA sample and creation of the DNA profile for CODIS. This search also has the potential to infringe upon privacy interests.").

By contrast, in *Edwards,* the analysis at issue examined paint chips found in the defendant's clothing, which did not implicate the privacy concerns inherent in the use of physiological and medical information obtained from DNA analysis that was addressed in *Skinner. See Edwards,* 415 U.S. at 801–02, 94 S.Ct. 1234. Thus, in the present case, while Davis may not have had any expectation of privacy in the outward appearance of the clothing once it was in police custody, we nevertheless must consider the type of analysis conducted on that clothing to determine whether Davis retained a reasonable expectation of privacy in his DNA on the clothing, or in the DNA profile obtained from it.

The district court concluded that *Edwards* is inapplicable here because, unlike the defendant's clothing in Edwards, Davis' clothing was not seized pursuant to his arrest on the drug charges, but was seized before his arrest when his status was that of a reported crime victim. As noted by the district court, to allow the testing and retention of DNA profiles

from any evidence lawfully obtained by police could expose a victim of a crime whose blood, or other material from which DNA could be obtained, to having his or her DNA extracted and retained indefinitely in a law enforcement database. The district court reasoned:

> Taken to its logical extreme, the application of *Edwards* and its progeny to the instant case would mean that any citizen whose blood finds its way into lawful police custody as a result of victimization (e.g., child abuse, sexual assault and domestic violence victims, etc.), would then lose any expectation of privacy in the DNA markers in that blood, which could be used against him or her at a later date without the constitutional safeguard that a warrant supported by probable cause first be issued.

Id. at 647. It was on this basis, the distinction between the DNA of a victim and an arrestee, that the district court found *Edwards* inapplicable.

Although we are not faced here with the full range of potential problems identified by the district court, we agree with the district court that a person who is solely a crime victim does not lose all reasonable expectation of privacy in his or her DNA material simply because it has come into the lawful possession of the police. And, although Davis later was arrested, because the police seized his clothing when he was solely a crime victim, we conclude that his later arrest does not eradicate his expectation of privacy in his DNA material.

Our conclusion that Davis' status as a victim materially distinguishes the present case from *Edwards* is supported by our precedent and by decisions of our sister circuits. These decisions, in addressing whether, and under what circumstances, the Constitution allows the collection of DNA samples, uniformly recognize that persons who have not been arrested have a greater privacy interest in their DNA than would persons who have been arrested, such as the arrestee in *Edwards.*

First, our decision in *Jones v. Murray,* 962 F.2d 302 (4th Cir.1992), is instructive. There, we rejected a Fourth Amendment ***245** challenge to a Virginia law that required convicted felons in custody to submit blood samples for DNA analysis. We concluded that the identification of a person arrested upon probable cause "becomes a matter of legitimate state interest and he can hardly claim privacy in it." *Id.* at 306. Additionally, we recognized that "we do not accept even [a] small level of intrusion, [such as fingerprinting] for free persons without Fourth Amendment constraint." *Id.* at 306–07 (citing *Davis v. Mississippi,* 394 U.S. 721, 727, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969)). Thus, we emphasized that a court's constitutional analysis may differ depending on whether the person is an arrestee or a "free person."

Our sister circuits, in upholding DNA collection statutes against Fourth Amendment challenges, likewise have recognized that the status of an individual whose DNA is sought is material to the issue whether he had a reasonable expectation of privacy in that DNA. In *Mitchell,* for example, the Third Circuit sitting en banc upheld the suspicionless collection of DNA samples from arrestees principally on the basis that the fingerprinting of arrestees did not violate the Fourth Amendment. 652 F.3d at 411 (citing *Hayes v. Florida,* 470 U.S. 811, 813–18, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985) and *Davis,* 394 U.S. at 727, 89 S.Ct. 1394); *see also Mitchell,* 652 F.3d at 402 & n. 13 (collecting authority and noting that "[e]very federal circuit court to have considered [the federal DNA Act and its state law analogues] as applied to an individual who has been convicted and is either incarcerated or on probation, parole, or supervised release has upheld the constitutionality of the challenged statute"). Additionally, in *United States v. Kincade,* 379 F.3d 813 (9th Cir.2004) (en banc), a plurality of the Ninth Circuit held that the federal DNA act requiring the collection of DNA samples from convicted felons was constitutional. *See* 379 F.3d at 835–36 (O'Scannlain, J., plurality opinion) (noting "the obvious and significant distinction between the DNA profiling of law-abiding citizens who are passing through some transient status (*e.g.,* newborns, students, passengers in a car or on a plane) and lawfully adjudicated criminals whose proven conduct substantially heightens the government's interest in monitoring them and quite properly carries lasting consequences that simply do not attach from the simple fact of having been born, or going to public school, or riding in a car"); *see also Green v. Berge,* 354 F.3d 675, 678–79 (7th Cir.2004) (rejecting Fourth Amendment challenge to law requiring DNA samples from felons and contrasting felons from persons not otherwise in custody); *id.* at 679–81 (Easterbrook, J., concurring) (constitutional challenges to DNA—collection statutes differ depending on the status of the person whose DNA is being collected, and noting that "[t]his appeal does not present the question whether DNA could be collected forcibly from the general population").

Unlike the cases cited immediately above, however, which concerned parolees, persons on supervised release, convicted felons, or arrestees, the HCPD had possession of Davis' DNA because he was the victim of a crime. Thus, the above cases inferentially provide support for Davis' position, because they

all distinguish an arrestee or one convicted of a crime from members of the general public at large.

These cases, however, do not directly answer the question before us, because they involved challenges to the *collection* of DNA samples, and not, as here, a challenge to the extraction of DNA or retention of a DNA profile when the police already had lawful possession of the DNA sample. And, for the same reason, these cases do not eliminate any consideration of *Edwards* in circumstances like these. *But* ***246** *see United States v. Weikert,* 504 F.3d 1, 16–17 (1st Cir.2007) (suggesting that "it may be time to reexamine the proposition that an individual no longer has any expectation of privacy in information seized by the government so long as the government has obtained that information lawfully.... In short, there may be a persuasive argument on different facts that an individual retains an expectation of privacy in the future uses of her DNA profile").

Nevertheless, we are persuaded by the Supreme Court's analysis in *Skinner,* as applied in *Mitchell* and other cases in the context of DNA, that the extraction of DNA and the creation of a DNA profile result in a sufficiently separate invasion of privacy that such acts must be considered a separate search under the Fourth Amendment even when there is no issue concerning the collection of the DNA sample. *See Mitchell,* 652 F.3d at 407 (citing *United States v. Sczubelek,* 402 F.3d 175, 182 (3d Cir.2005) (citing *Skinner,* 489 U.S. at 616, 109 S.Ct. 1402)).

Based on the foregoing, we conclude that the holding in *Edwards* does not give a law enforcement agency carte blanche to perform DNA extraction and analysis derived from clothing lawfully obtained from the victim of a crime in relation to the investigation of other crimes. Instead, a victim retains a privacy interest in his or her DNA material, even if it is lawfully in police custody. Therefore, we conclude that the extraction of Davis' DNA sample from his clothing and the creation of his DNA profile constituted a search for Fourth Amendment purposes.

We turn to consider whether a separate search occurred when the PGCPD retained Davis' DNA profile in the local CODIS database after the profile did not implicate him in the Neal murder. Our sister circuits do not appear to be uniformly settled on the question whether such entry of a DNA profile into this type of database is a search entitled to Fourth Amendment protection. *Compare, e.g., Boroian v. Mueller,* 616 F.3d 60, 67–68 (1st Cir.2010) (concluding that the retention and later matching of a lawfully obtained DNA profile is not a search for Fourth Amendment purposes and collecting authority for the same) *with United States v. Amerson,* 483 F.3d 73, 85 (2d Cir.2007) (in addition to the collection of the DNA sample from a probationer, determining that "[t]here is ... a second and potentially much more serious invasion of privacy occasioned by the DNA Act" because the "analysis and maintenance of [offenders'] information in CODIS ... is, in itself, a significant intrusion") (citation omitted) *and Kincade,* 379 F.3d at 841–42 (en banc) (Gould, J., concurring) (suggesting the retention of a lawfully obtained DNA profile once a person has "fully paid his or her debt to society" and "left the penal system" would implicate the person's privacy interest).

These differing conclusions illustrate the fact that at least some courts have concluded that once a DNA profile has been lawfully obtained and entered into CODIS, the retention of that profile and "periodic matching of the profile against other profiles in CODIS for the purpose of identification[,]" is not a search because it does not intrude upon an offender's legitimate expectation of privacy. *Boroian,* 616 F.3d at 67–68 (so holding and citing other authority for the same).[25] Other courts, at ***247** least in principle, have left open the possibility that an unrelated examination after DNA retention could be a separate search for Fourth Amendment purposes. *See, e.g., Amerson,* 483 F.3d at 85 n. 12.

We need not choose among these competing principles in this case because, as discussed in the next section, we conclude that the extraction and initial testing of Davis' profile was an unreasonable Fourth Amendment search. Accordingly, for purposes of this opinion, we will assume, without deciding, that Davis had a continuing right of privacy in his DNA profile, and that a search occurred in the retention of that profile. We now turn to consider the issue whether the two searches were reasonable.

3.

Whether the Searches Were Reasonable Under the Fourth Amendment?

As noted above, not every warrantless search violates the Fourth Amendment. Instead, a Fourth Amendment violation occurs when a warrantless search is unreasonable. *See Skinner,* 489 U.S. at 619, 109 S.Ct. 1402. Courts

have employed several different approaches in assessing reasonableness.[26] With regard to searches in which there is an absence of individualized suspicion, the "general Fourth Amendment approach" is to "examine the totality of the circumstances" to determine whether a search is reasonable. *Samson v. California,* 547 U.S. 843, 848, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006). Under this approach, the reasonableness of a search "is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.* (citation and internal quotation marks omitted).

For example, in *United States v. Knights,* 534 U.S. 112, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001), the Supreme Court applied the totality of the circumstances approach in upholding the search of a probationer's apartment based on the presence of "reasonable suspicion," but in the absence of probable cause. *Id.* at 118, 121, 122 S.Ct. 587. Similarly, in *Samson,* the Court upheld a suspicionless search of a parolee applying the same approach. 547 U.S. at 846, 126 S.Ct. 2193.

***248** Courts also have applied a "special needs" analysis in certain circumstances to uphold contested searches. *See Griffin v. Wisconsin,* 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987); *Kincade,* 379 F.3d at 823–832 (en banc) (O'Scannlain, J., plurality opinion) (describing development of the special needs doctrine and various Supreme Court cases utilizing it). The special needs doctrine allows warrantless searches "where a Fourth Amendment intrusion serves *special governmental needs,* beyond the normal need for law enforcement" and "when balancing the individual's privacy expectations against the government's interests leads to the determination that it is 'impractical to require a warrant or some level of individualized suspicion in the particular context.' " *United States v. Rendon,* 607 F.3d 982, 989 (4th Cir.2010) (quoting *Von Raab,* 489 U.S. at 665–66, 109 S.Ct. 1384) (emphasis in *Rendon*).

The district court found here that the special needs doctrine was inapplicable, because "the governmental interest in this case cannot be characterized as anything other than an ordinary interest in law enforcement." *Davis,* 657 F.Supp.2d at 651. Thus, the district court employed the totality of the circumstances test. Applying that test, the district court found the extraction of Davis' DNA in conjunction with the Neal murder investigation was "reasonable." *Id.* at 654.

On appeal, Davis argues that the totality of the circumstances test is not applicable, because it applies only when a person being searched has "substantially diminished privacy rights." (Appellant's Br. 53.) Instead, Davis argues that nothing less than a warrant and probable cause would have allowed the testing and retention of his DNA profile. Davis further argues that, even if the totality of the circumstances test were applicable, the district court applied the test incorrectly. The government also argues that the district court erred in applying the totality of the circumstances test because, in the government's view, *Edwards* resolves the issue against Davis.[27]

We begin this part of our analysis by restating our conclusion that the holding in *Edwards* is not dispositive of the matter under the unique facts before us, and that Davis retained a reasonable expectation of privacy in his DNA profile. We also consider as part of our analysis the fact that Davis' expectation of privacy may have been diminished to some degree because Davis knew that the police had retained his clothing, yet had taken no action to retrieve his personal effects following his release. Thus, we analyze the reasonableness of the searches here under the "totality of the circumstances test."[28] Our employment of this test is consistent with the decisions of most of our sister circuits, which have applied the test in cases where there was a diminished expectation of privacy. *See Mitchell,* 652 F.3d at 403 n. 15 (noting that only the Second and Seventh Circuits have consistently ***249** held that the "special needs" test should apply instead of the totality of the circumstances test in addressing the constitutionality of a DNA indexing statute).

Applying the totality of the circumstances test here requires us to "assess [ ], on the one hand, the degree to which [the search] intrudes upon [Davis'] privacy, and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Knights,* 534 U.S. at 119, 122 S.Ct. 587. When considering the magnitude of the intrusion upon Davis' privacy, we think it very significant that these DNA searches were conducted in 2004, at a time when Davis was a free citizen and had never been convicted of a felony. The PGCPD extracted Davis' DNA from his clothing, created Davis' DNA profile, and checked that profile against evidence on the CODIS database, all while Davis was a free citizen who retained a reasonable privacy interest in his DNA sample and DNA profile, as we have discussed. However, his privacy interest was diminished to a degree by the fact that he knew that the police had retained his bloody clothing, and yet did

nothing to retrieve the clothing or otherwise claim ownership in it.

In contrast to many DNA privacy cases, the privacy interest in Davis' bodily integrity was not implicated when police obtained the DNA sample, because it was taken from his clothing, rather than from his person. This too is a factor that we must consider under the totality of the circumstances. *See e.g., Mitchell,* 652 F.3d at 404 (weighing the "minimal" intrusion of privacy caused by DNA sample collection by blood test); *Jones,* 962 F.2d at 307 (weighing "minor intrusion" caused by DNA sample collection by blood test).

We next turn to consider the government's interest in conducting the search. The police, of course, have a strong and important interest in apprehending and prosecuting those who have committed violent crimes, like the Neal murder and the murder of Schwindler in this case. The government also has a legitimate interest in entering and maintaining information in CODIS and in increasing the number of entries in CODIS to improve its efficacy as a crime-solving tool. *See Haskell v. Harris,* 669 F.3d 1049, 1062 (9th Cir.2012), *reh'g en banc granted,* 686 F.3d 1121 (2012) (upholding California law requiring police to collect DNA samples from all adult felony arrestees and citing the government's four "key interests": "identifying arrestees, solving past crimes, preventing future crimes, and exonerating the innocent").

In balancing these competing interests to determine the reasonableness of the searches at issue, we are guided by the weighty reasons underlying the warrant requirement: to allow a detached judicial officer to decide "[w]hen the right of privacy must reasonably yield to the right of search," and not "a policeman or Government enforcement agent." *Johnson v. United States,* 333 U.S. 10, 13–14, 68 S.Ct. 367, 92 L.Ed. 436 (1948) (quoted in *Davis,* 657 F.Supp.2d at 653.) The right protected is "a right of personal security against arbitrary intrusions by official power." *Coolidge v. New Hampshire,* 403 U.S. 443, 455, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The importance of the judge or magistrate in the process is why the exceptions to the warrant requirement are "jealously and carefully drawn." *Id.*

The potential for arbitrary intrusions of one's privacy from warrantless searches in cases involving felons, parolees, or arrestees is mitigated by the fact that officials are required to collect from everyone in that certain group of persons. They cannot selectively choose which persons within a particular group must submit a DNA ***250** sample. *See, e.g., Mitchell,* 652 F.3d at 415 (the search is further rendered reasonable because "there is no room for law enforcement officials to exercise (or abuse) discretion by deciding whether or not to collect a DNA sample"); *Amerson,* 483 F.3d at 82 ("[T]he programmatic nature of the 2004 DNA Act—all felons are required to submit DNA samples, and the uses of those samples are strictly circumscribed—leaves no discretion for law enforcement personnel to decide whether to force an individual to submit to a taking of a DNA sample or how to use the information collected. This lack of discretion removes a significant reason for warrants—to provide a check on the arbitrary use of government power. *See Skinner,* 489 U.S. at 621–22, 109 S.Ct. 1402.").

In this case, by contrast, Davis' DNA was specifically sought as a result of police suspicions that he was involved in the Neal murder, and based on some quantum of proof amounting to less than probable cause. Indeed, the parties' briefs and the record before us are devoid of any factual basis for concluding that Davis was involved in the Neal murder. Thus, the precise concern that the warrant requirement was designed to alleviate is plainly before us here. That fact alone severely diminishes the reasonableness of the search. Thus, our comparison of the respective interests leads us to conclude that the government's extraction of Davis' DNA sample from his clothing and creation of his DNA profile for testing in the Neal murder investigation constituted unreasonable searches under the Fourth Amendment.

Lastly, we assume, without deciding, that the entry and retention of Davis' profile into the CODIS database under these circumstances was also unreasonable under the Fourth Amendment, because the police only had Davis' DNA profile as a result of a Fourth Amendment violation resulting from the extraction and testing of his DNA profile against the DNA in the Neal investigation.

The conclusion that Fourth Amendment violations occurred does not end our inquiry, however. Instead, as we discuss next, we conclude that the exclusionary rule should not be applied to remedy these violations.[29]

***251** IV.

The "Good Faith" Exception to the Remedy of Suppression

Having determined that there was a Fourth Amendment violation in the extraction and testing of Davis' DNA profile, and having assumed, but not decided, there was a second violation in the retention of his profile, we address whether suppression is the proper remedy. *Leon,* 468 U.S. at 906, 104 S.Ct. 3405 ("Whether the exclusionary sanction is appropriately imposed in a particular case ... is an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.") (citation and internal quotation marks omitted). As noted, the district court concluded that suppression was not warranted because the "good faith" exception to the exclusionary rule was applicable. For the reasons discussed below, we agree.

The Supreme Court articulated the "good faith" exception to the exclusionary rule in *Leon,* 468 U.S. at 920, 104 S.Ct. 3405. In that case, the Court refused to apply the exclusionary rule where police properly executed a search warrant, but it was later determined the issuing magistrate had erred as the warrant lacked probable cause. *Id.* at 922, 104 S.Ct. 3405. The Supreme Court has also applied the "good faith" exception to warrantless administrative searches performed in good-faith reliance on a statute later declared unconstitutional, *Illinois v. Krull,* 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987), and to an arrest by police who reasonably relied on erroneous information, entered by a court employee into a court database, that an arrest warrant was outstanding, *Arizona v. Evans,* 514 U.S. 1, 14, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995).

The Supreme Court's recent decisions applying the exception have broadened its application, and lead us to conclude that the Fourth Amendment violations here should not result in the application of the exclusionary rule. *See Herring,* 555 U.S. at 135, 129 S.Ct. 695; *Davis v. United States,* —— U.S. ——, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011).

In both *Herring,* and *Davis,* the Supreme Court emphasized the crucial role that deterrence plays in determining whether to apply the exclusionary rule. Specifically, "the benefits of deterrence must outweigh the costs." *Herring,* 555 U.S. at 141, 129 S.Ct. 695 (citing *Leon,* 468 U.S. at 910, 104 S.Ct. 3405 (1984)). That is, courts must weigh the deterrent effect of applying the rule against the cost to society. The "principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that 'offends basic concepts of the criminal justice system.' " *Id.* at 141, 129 S.Ct. 695 (quoting *Leon,* 468 U.S. at 908, 104 S.Ct. 3405).

In determining the deterrent effect of applying the rule, the *Herring* Court explained that the deterrent effect is higher where law enforcement conduct is more culpable. Thus, " 'an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus' of applying the exclusionary rule." *Id.* at 143, 129 S.Ct. 695 (quoting *Leon,* 468 U.S. at 911, 104 S.Ct. 3405).

The *Herring* Court explained that the rule should not be applied where excluding the evidence would have little deterrent effect on future constitutional violations by law enforcement officers, and the cost to society of such a rule is high. *Id.* at 147–148, 129 S.Ct. 695 (concluding that "when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal ***252** deterrence does not 'pay its way' " and the exclusionary rule should not be applied).

In *Herring,* the mistake made by police was that a police department in Dale County, Alabama told the neighboring Coffee County police that the defendant had an outstanding arrest warrant in Dale County. *Id.* at 137–38, 129 S.Ct. 695. In fact, the Dale County arrest warrant had been recalled five months earlier, but had never been deleted from the electronic database. *Id.* at 138, 129 S.Ct. 695. After being given the incorrect information that the warrant was outstanding, a Coffee County police officer detained Herring, and found drugs and a gun on his person. *Id.* Herring sought to exclude the evidence seized from his person. *Id.* at 137, 129 S.Ct. 695.

The majority distinguished the negligent conduct involved in *Herring* from earlier cases where the good faith exception did not apply, calling the error before it the "result of isolated negligence attenuated from the arrest." *Id.* at 137, 129 S.Ct. 695.

More recently, the Supreme Court followed the *Herring* analysis in *Davis,* 131 S.Ct. 2419, where the Court considered "whether to apply [the exclusionary rule] when the police conduct a search in compliance with binding precedent that is later overruled." *Id.* at 2423. The Court ruled that the exclusionary rule should not be applied in those circumstances, "[b]ecause suppression would do nothing to deter police misconduct ... and because it would come at a high cost to both the truth and the public safety." *Id.* In

so ruling, the Court again expounded on the balancing test that courts must apply after finding a Fourth Amendment violation: "For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs." *Id.* at 2427 (citing *Herring,* 555 U.S. at 141, 129 S.Ct. 695, and *Leon,* 468 U.S. at 910, 104 S.Ct. 3405). Justice Alito, writing for the Court, elaborated:

> The basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion vary with the culpability of the law enforcement conduct at issue. When the police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. But when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force and exclusion cannot pay its way.

Davis, 131 S.Ct. at 2427–28 (internal citations, quotation marks and brackets omitted).

The *Davis* Court also reviewed the line of "good faith exception" cases, starting with *Leon,* concluding that "in 27 years of practice under *Leon's* good-faith exception, we have 'never applied' the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct." *Id.* at 2429 (quoting *Herring,* 555 U.S. at 144, 129 S.Ct. 695.)

Indeed, the *Davis* Court focused on the issue of culpability as the decisive factor in the case before it:

> Under our exclusionary-rule precedents, this acknowledged absence of police culpability dooms Davis' claim. Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield "meaningfu[l]" deterrence, and culpable enough to be "worth the price paid by the justice system." *Herring,* 555 U.S. at 144, 129 S.Ct. 695. The conduct of the officers here was neither of these things. The officers who conducted the search did not violate Davis's Fourth Amendment rights deliberately, ***253** recklessly, or with gross negligence. *See ibid.* Nor does this case involve any "recurring or systemic negligence" on the part of law enforcement. *Ibid.*

Davis, 131 S.Ct. at 2428.

In order to properly apply *Leon, Herring*, and *Davis* here, we must focus on the culpability of the actors who committed the violations. The government mistakenly argues that we should focus on the conduct and "good faith" of PGCPD Detective Blazer, who, based on the cold hit, obtained the warrant for Davis' known DNA. It is true that nothing in the record suggests that Detective Blazer engaged in any culpable, or even negligent, conduct. He relied in good faith on the cold hit obtained and followed proper procedures in getting a search warrant based on it. There is nothing to suggest that his conduct was improper or that he had any obligation to look behind the cold hit match to see if there was some earlier constitutional violation.

But the deterrent effect of the exclusionary rule must be judged at the point of the constitutional violation, and the culpability of the actors involved then. The pertinent inquiry is whether we apply the exclusionary rule to keep similar violations from happening again; here, to prevent and deter the warrantless extraction of a victim's DNA from materials lawfully in police custody when he later becomes a suspect and then to deter that DNA profile from being retained. Thus, we look at the culpability of the police officers involved in those decisions, not at Detective Blazer.

As to the first violation, the extraction and testing of Davis' DNA in connection with the Neal murder, we find nothing in the conduct of the PGCPD officers that would warrant exclusion. As an initial matter, the PGCPD officers had no reason to question that Davis' blood was lawfully within HCPD custody and indeed, we have concluded that the clothing was properly in police custody.

Although we do not have detailed testimony before us as to the subjective motivations of the PGCPD officers who obtained the clothing and requested it be tested, the unique facts of this case reflect, at most, isolated negligence. What the officers did here was to obtain clothing that was lawfully in police custody and to test it for evidence. Significantly, the only reason they knew of the clothing's existence was because of Davis' *arrest* on drug charges when he left the hospital in Howard County. Had the clothing been obtained initially because of his arrest (like the other items on the property form), *Edwards* and *Wallace v. State,* 373 Md. 69, 816 A.2d 883 (2003), a Maryland Court of Appeals decision applying *Edwards,* likely would have permitted the testing. Thus, attributing culpability to the officers at this stage would be based on either: (1) their failure to learn, or recognize, that the clothing was in police custody because Davis was a victim, rather than an arrestee; or (2) assuming they did know the clothing had been seized from a crime victim, their failure to recognize that Davis' dual status as victim and arrestee might change the legal analysis set

forth in *Edwards* and *Wallace.* This is simply not the type of "flagrant," or "intentional ... patently unconstitutional" conduct that warrants the application of the exclusionary rule. *See Herring,* 555 U.S. at 143–44, 129 S.Ct. 695. The conduct of PGCPD officers, in testing the blood contained on otherwise lawfully-seized clothing, does not constitute the type of "deliberate, reckless or grossly negligent" conduct that warrants exclusion. *See id.* at 144, 129 S.Ct. 695. As the *Herring* Court explained, "[a]n error that arises from nonrecurring and attenuated negligence is thus far removed ***254** from the core concerns that led us to adopt the rule in the first place." *Id.*

The dissent's mantra of "deliberate and intentional" police conduct at each step in the factual scenarios here, *see post* at 281, does not alter the facts as we have set them forth or the proper analysis to be applied to them. To be sure, the police took the steps that they did deliberately and intentionally in the sense that their actions were not accidental. But for the reasons we explain, one could insert "innocently" or "without knowledge of any constitutional violation," before each of those actions.

Likewise, as to any violation that occurred when the analyst entered Davis' DNA profile into the database after he was not a match in the Neal murder investigation, the record simply does not disclose anything that suggests that this action was anything other than an isolated, negligent incident at best. There is nothing, first of all, to show that the analyst here knew or should have known entering the data would violate the Fourth Amendment. Indeed, the many court decisions (including this Court's decision in *Jones*), that have considered challenges to the use of DNA evidence have uniformly upheld statutes and other laws allowing the collection and testing of DNA evidence.

Additionally, while the paperwork accompanying Davis' clothing indicated that it came from a victim's clothing (J.A. 164, Supp. J.A. 76), it is not at all clear that the analyst actually knew anything other than that the evidence came from a "suspect in a shooting." (Supp. J.A. 93.) Similar to *Leon* and *Herring,* where officers relied on records from others in law enforcement, the PGCPD officers were relying on the fact that the HCPD had lawfully obtained the evidence. Indeed, while we rejected the government's broad construction of *Edwards* based on the fact that Davis was a victim when police seized his clothing, courts have repeatedly held, in broad terms, that evidence lawfully seized by one police agency may be given to another, even for a different purpose and even for additional testing.[30]

So, while we have determined for purposes of this opinion that *Edwards* did not allow the testing because Davis, as a victim, retained an objectively reasonable expectation of privacy in his DNA, that does not mean that the PGCPD officers and DNA analyst were not acting in a good faith belief that they had authority to do ***255** that testing under *Edwards* and similar cases.

Additionally, there is no evidence before this Court that the retention of a DNA profile in circumstances like that of Davis, is a systemic or recurring problem. The dissent disagrees, relying heavily on what it describes as an "admission" of the government at oral argument that the constitutionally violative conduct here was "clearly systemic." *See post* at 279. In our view, that reliance is misplaced. At oral argument, in response to questioning, counsel for the government briefly set forth the basic PGCPD policy or practice that the analyst was following.[31] Specifically, counsel explained that if a piece of evidence was analyzed for DNA evidence and a DNA profile was obtained from it, or if a DNA profile was obtained from a "known sample," then those DNA profiles were uploaded into the local CODIS database.

From this, our dissenting colleague assumes that evidence tainted by antecedent constitutional violations would also be uploaded to the database. But while it is possible to imagine, given the policy as articulated, that DNA evidence obtained by an illegal search or pursuant to an illegal arrest might end up in CODIS, there is no testimony before us as to whether that actually happened in any other instance. Indeed, defense counsel conceded at oral argument that the evidentiary record before this Court does not contain a single other example of a person's DNA being placed into the PGCPD local CODIS database without a proper constitutional basis. Any conclusion to that effect is purely speculative.

Moreover, as we have repeatedly made clear, our finding of a constitutional violation in this case was based on the specific and unusual facts of this case. Here, the police properly seized a piece of evidence from a victim in one crime, but then unconstitutionally used DNA evidence extracted from that evidence in investigating an unrelated crime in which the original victim was a suspect. They did so without consent from the victim and without obtaining a warrant, and thus we have found a violation. But a change in any one of those facts might have rendered the inclusion of Davis' DNA in CODIS

constitutionally permissible. For example, had the clothing been taken from Davis as part of an inventory search at the time of his arrest for the present crime, as was the clothing in *Edwards,* rather than seized from him when he was a victim of a different crime, the result likely would have been different. Similarly, had the police obtained a search warrant to extract Davis' DNA from his pants and test it in conjunction with the Neal murder, the result likely would have been different.[32] So, the mere fact that other victims' DNA might be present in the database does not mean there were other constitutional violations.

Likewise, there is no evidence before us that the analyst acted with knowledge that ***256** she should not retain the profile.[33] Like the conduct at issue in *Herring* and in *Davis,* then, the conduct here stands in stark contrast to the cases in which the exclusionary rule has been applied, described by the *Herring* Court as "patently unconstitutional" conduct. *See Herring,* 555 U.S. at 143, 129 S.Ct. 695. Moreover, given the evolving and unsettled law governing DNA searches and seizures (as amplified by the district court's lengthy decision in this case, the briefs on appeal, and the lack of controlling Fourth Circuit or Supreme Court precedent), the conduct of the officers entering and retaining Davis' DNA profile can hardly be characterized as brazen or reckless.

We also note that Congress and the Maryland legislature, through their imposition of fines and criminal penalties for failures to comply with their respective DNA statutes, already provide a deterrent effect against similar and future potential misuses of DNA information. Md.Code Ann. Pub. Safety § 2–512 (providing penalties for persons who misuse, disclose, or fail to destroy certain DNA records as required by the Maryland Act); 42 U.S.C. §§ 14135e(c), 14132(c) (same as to federal DNA act). This factor, too, militates in favor of judicial restraint in exercising the remedy of suppression, which exacts a "costly toll upon truth-seeking and law enforcement objectives." *Cf. Herring,* 555 U.S. at 141, 129 S.Ct. 695 (citation omitted); *see also Osborne,* 557 U.S. 52, 129 S.Ct. at 2312 (describing the response of the federal government and the states in regulating DNA testing as "prompt and considered").

In short, the obtaining and testing of Davis' DNA from his bloody clothing, and the subsequent inclusion of his DNA profile in the database were, at best, "isolated negligence attenuated from the arrest" [for the Schwindler murder]. *See Herring,* 555 U.S. at 137, 129 S.Ct. 695. We have no proof before us showing that victims' DNA profiles or individuals cleared of suspicion in an investigation are routinely entered into the local database by PGCPD, or have been entered into the database in any other instance. There is nothing in the record to suggest that the acts here are likely to reoccur. Moreover, the particularly unusual facts of this case—where a victim, with a dual status as an arrestee, later becomes a suspect in an unrelated crime, and there is DNA evidence available as a result of the crime in which the person was a victim—diminish further the likelihood of reoccurrence. The price to society of application of the exclusionary rule here, especially since the DNA evidence against Davis was compelling, would be to allow a person convicted of a deliberate murder to go free. The deterrent effect, if any, would be minimal, especially considering the lack of culpable conduct on the part of the police. Exclusion, therefore, would not "pay its way." *See Davis,* 131 S.Ct. at 2428.[34]

***257** For the foregoing reasons, the good faith exception to the exclusionary rule applies and we affirm the district court's denial of Davis' motion to suppress.

V.

Davis' second and final contention is that the district court erred in excluding the testimony of his proffered expert, Dr. Jeffrey Neuschatz. We review a district court's evidentiary rulings, including rulings on the admissibility of expert testimony, for abuse of discretion. *Gen. Elec. Co. v. Joiner,* 522 U.S. 136, 141–42, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997); *United States v. Barsanti,* 943 F.2d 428, 432 (4th Cir.1991) (decision whether to admit expert testimony "will not be reversed absent a clear abuse of discretion"). We have reviewed the pertinent portions of the record on this issue and find no abuse of discretion with regard to this evidentiary ruling.

At trial, in addition to the DNA evidence and other evidence concerning the offenses, there was one witness, Laverda Jessamy, who identified Davis as being one of the robbers at the scene of the bank robbery and Schwindler shooting. She had done so both from a photographic array and in person at trial. In response to this identification, Davis sought to introduce the testimony of Dr. Jeffrey Neuschatz as an expert in eyewitness identifications. According to his expert witness report, Dr. Neuschatz intended to testify that the lineup procedure used with Ms. Jessamy did not meet the good practices guidelines of the American Psychology–Law

Society and to testify concerning a number of factors which might result in a misidentification.

The government moved to exclude this evidence, contending that much of the proffered testimony consisted of common sense factors within the jury's understanding and not requiring expert testimony. After a hearing, the district court granted the government's motion to exclude Dr. Neuschatz's testimony on the grounds that it would not assist the jury. The court also explained that the testimony was not admissible under Fed.R.Evid. 403. In particular, the district court concluded that the probative value of the testimony was low because there was significant other evidence of guilt other than the eyewitness testimony and it was not a case where the government was relying, either exclusively or primarily, on eyewitness testimony. Thus, the danger of unfair prejudice, confusing of the issues or misleading the jury heavily outweighed the probative value of the testimony.

We have reviewed Dr. Neuschatz's report and his testimony at the *Daubert* hearing, and find that the district court did not abuse its discretion in concluding that the proffered evidence was not "scientific knowledge" that would be of benefit to the jury. This is consistent with our prior decision in *United States v. Harris,* 995 F.2d 532 (4th Cir.1993). In *Harris,* we recognized the "trend in recent years to allow such testimony under [narrow] circumstances," but nonetheless concluded that "jurors using common sense and their faculties of observation can judge the credibility of an eyewitness identification, especially since deficiencies or inconsistencies in an eyewitness's testimony can be brought out with skillful cross-examination." *Id.* at 534–35.

The district court also did not abuse its discretion when concluding that, even if it qualified as a proper subject of expert testimony, the probative value of the testimony, which was low, was outweighed by the danger of prejudice or confusing the jury. Accordingly, it was not an abuse of discretion to exclude the evidence on Rule 403 grounds.

***258** Finally, we also agree with the government that, even if the testimony was wrongfully excluded, it was at most, harmless error. Most of the points that would have been made by Dr. Neuschatz were made by Davis' counsel on cross-examination. The compelling DNA evidence against Davis, as well as the evidence of unexplained cash purchases by him and his girlfriend in the days following the robbery were overwhelming evidence of guilt. The detailed jury instruction given by the court, moreover, further recognized and correctly advised the jury as to the legal issues concerning eyewitness identifications. In light of all these factors, we find no abuse of discretion by the district court in excluding the witness.

VI.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

DAVIS, Circuit Judge, dissenting:

There is much in the majority's thoughtful and thorough opinion with which I agree. Alas, however, "I feel constrained by a sense of duty to express my nonconcurrence in the action of the court in this present case." *Twining v. New Jersey,* 211 U.S. 78, 114, 29 S.Ct. 14, 53 L.Ed. 97 (1908) (Harlan, J., dissenting). I part company from the majority on two issues: (1) its application of the plain view exception to justify the seizure of the bag containing Davis's clothing from the hospital and the subsequent search of that bag and (2) its refusal to apply the exclusionary rule.[1] I conclude for the reasons explained herein that the seizure of the bag was unlawful and, even assuming the seizure could somehow be justified, the subsequent *search* of the bag effected a distinct violation of Davis's constitutionally protected privacy interests. Furthermore, I conclude that the majority's creation of a free-standing, ad hoc exception to the exclusionary rule is unwise and unsupported by the facts of this case, extant Supreme Court precedents, or our own precedents. Thus, I would vacate the judgment, reverse the denial of Davis's motion to suppress, and remand this case for further proceedings, as appropriate.[2]

***259** I.

A.

On August 29, 2000, Davis was treated at Howard County (Maryland) General Hospital for a gunshot wound to his right thigh. Davis told hospital staff that he had been shot in the course of a robbery. As required by state law, hospital personnel notified the Howard County Police Department ("HCPD") that it was treating a gunshot victim. *See* Md.Code Ann., Health–Gen. § 20–703. Detective Joseph King of the

HCPD, then a uniformed patrol officer, was the first to respond to the hospital; King spoke with Davis concerning the circumstances of the shooting. Detective King testified at the suppression hearing that the hospital had been on his beat for approximately two years, and that he had responded on previous occasions to individuals with gunshot wounds. When he arrived at the hospital, he located Davis in the emergency room on a bed or gurney. According to Detective King, Davis presented him with a District of Columbia driver's license that showed his photograph and the name "Gary Edmonds."

Detective King observed Davis's gunshot wound. He then seized a bag containing Davis's pants and boxer shorts, which had been removed by hospital personnel, placed in the bag, and stored on a shelf beneath the bed. Detective King testified that he considered the clothing to be evidence of the crime reported, i.e., Davis's shooting. Detective King did not receive assistance from hospital personnel in retrieving the bag, which he testified was similar to other occasions on which he had responded to the hospital to investigate shootings. Detective King did not seek or obtain Davis's consent to take the bag or otherwise discuss the matter with Davis. He assumed Davis was aware that he was taking the bag because Davis observed him take possession of it. Detective King described Davis's attitude towards questioning as "uncooperative." J.A. 143.

A short time later, Lieutenant Steven Lampe appeared at the hospital. Lieutenant Lampe took the bag from Detective King and later submitted it to the HCPD property room to be held as evidence. Lieutenant Lampe testified that the clothing was in a plastic bag when he took it from Detective King, but he could not recall what the bag looked like. Lieutenant Lampe did not inspect the clothing right away. Consistent with Detective King's testimony, he stated that Davis was not forthcoming in response to questioning, gave only vague information about the shooting, and was not interested in reporting the crime. After speaking with Davis, the police attempted to confirm his identity through various computer inquiries and found no history of a "Gary Edmonds."

Because the officers believed that Davis was being untruthful in his report of how he was shot, in part due to his lack of cooperation, the officers located the vehicle in which Davis's friend had driven him to the hospital, observed what appeared to be blood on the front passenger seat, and requested a K–9 officer to have his dog scan the car. The dog positively alerted to the presence of a controlled dangerous substance ("CDS"), and the car was searched. The police recovered a small amount of marijuana in the vehicle and accordingly arrested Davis and took him into custody upon his release from the hospital later that day. Lieutenant Lampe testified that the hospital staff had given Davis something to wear, Davis's clothing having been seized by Detective King. The police subsequently identified Davis by his fingerprints as "Earl Davis," and he admitted his true identity. Davis was charged with possession of marijuana and possession ***260** of CDS paraphernalia, but the charges were later dismissed.

The investigation into Davis's shooting concluded without an arrest, and the case was considered closed as of November 7, 2000. To that point, no forensic testing had been conducted on the bloody clothing seized from Davis at the hospital. Davis was not contacted or otherwise advised that the shooting investigation was closed.

Several months later, in June 2001, an individual named Michael Neal was murdered in nearby Prince George's County, Maryland. At some point in the ensuing three years detectives in the Prince George's County Police Department ("PGCPD") came to suspect Davis of having committed the murder. In the course of investigating the Neal murder, in April 2004 members of the PGCPD contacted Lieutenant Lampe to inquire about Davis's arrest at Howard County General Hospital in 2000. The PGCPD officers specifically asked whether any property had been seized from Davis that might contain his DNA. Lieutenant Lampe understood from this inquiry that Davis was now a suspect in a homicide. Later that month, two PGCPD homicide detectives who were familiar with the facts of the Neal murder went to the HCPD to pick up Davis's clothing for the purpose of DNA testing. Lieutenant Lampe delivered the clothing to the PGCPD detectives on April 29, 2004. On the property form for the clothing, Davis was clearly identified as a "victim." J.A. 164. Davis was not notified that the PGCPD had obtained his clothing. The PGCPD detectives submitted Davis's clothing to their DNA lab in connection with their investigation of the Neal murder.

Shortly thereafter, in or around June 2004, Davis's DNA was extracted from the blood stains on his boxer shorts, his profile was created, and the profile was compared to an unknown DNA profile derived from evidence obtained at the scene of the Neal homicide. The profiles did not match, and Davis was therefore excluded as the source of the evidentiary sample from the Neal murder. Davis's DNA profile was then entered into the local Prince George's County Combined DNA Index

System ("CODIS") database. His DNA profile was never expunged or otherwise removed from the database.

B.

On August 6, 2004, shortly before 1:00 p.m., Jason Schwindler, an armored car employee, picked up a bank deposit from a local business and took it to a nearby BB & T bank in Hyattsville, Maryland, located in Prince George's County. As Schwindler walked up to the bank entrance, two gunmen exited a Jeep Cherokee and shot Schwindler, killing him. When their escape in the Jeep was thwarted by the armored truck driver, the assailants carjacked a bank customer and fled in her Pontiac Grand Am. The carjacked vehicle was later recovered.

After Schwindler's murder, officers from the PGCPD responded to the crime scene and collected evidence. Numerous items were recovered, including a baseball cap worn by one of the shooters, two firearms, and steering wheel covers from the Jeep Cherokee and the Pontiac Grand Am, the vehicles the shooters had driven to and away from the crime scene, respectively. These items were swabbed and analyzed for DNA. The DNA profiles of the major contributor to the DNA found in the ballcap and on the trigger and grip of the recovered firearms were entered into the Prince George's County CODIS database. As a result of a search of the local database, on or about August 14, 2004, there was a "cold hit" between the DNA profile derived from material found on the baseball ***261** cap recovered at the crime scene and Davis's DNA profile in the database.

Law enforcement officers were notified of the match and, based on the cold hit, they promptly sought, and a state judge issued, warrants authorizing them to obtain DNA from Davis and to search the home of his girlfriend, Dana Holmes. Pursuant to the search warrant, a DNA sample was taken from Davis and his DNA profile was compared to the profiles derived from the DNA deposited on items recovered from the crime scene. The DNA analyst concluded that, to a reasonable degree of scientific certainty, Davis was the source of the DNA recovered from three pieces of evidence related to the Schwindler murder: (1) the steering wheel cover of the stolen Jeep Cherokee the assailants drove to the bank; (2) a baseball cap dropped by one of the assailants during the course of the robbery; and (3) the steering wheel cover of the Pontiac Grand Am in which the assailants fled the scene.

C.

On March 31, 2008, a federal grand jury returned a superseding indictment charging Davis with one count of Hobbs Act robbery, in violation of 18 U.S.C. § 1959; two counts of possession and discharge of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c); one count of possession and discharge of a firearm resulting in death (murder), in violation of 18 U.S.C. § 924(j); one count of carjacking, in violation of 18 U.S.C. § 2119; and one count of felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). Davis pleaded not guilty and proceeded to trial.

Prior to trial, Davis moved to suppress all direct and derivative evidence obtained from the warrantless seizure of his clothing at Howard County General Hospital, including his DNA profile. The district court denied Davis's motion to suppress after holding an evidentiary hearing and, following the conclusion of trial, filed a thoughtful opinion accepting some of Davis's arguments and rejecting others, but ultimately reaffirming its earlier denial of the motion to suppress. *United States v. Davis,* 657 F.Supp.2d 630 (D.Md.2009).

The DNA evidence presented at trial consisted of the PGCPD analyst's finding that Davis's DNA profile matched the DNA profile derived from the evidence recovered from the scene of the Schwindler murder to a reasonable degree of scientific certainty. Davis challenged the validity of the analyst's findings. In particular, he questioned whether the amount of DNA recovered from the crime scene was sufficient to produce accurate results and whether the government's statistical probability calculations (i.e., the statistics supporting the conclusion that Davis was the source of the DNA on each of the three items recovered from the crime scene) were reliable and accurate.

Davis's trial began on May 5, 2009, and lasted approximately five weeks. At the conclusion of the trial on June 3, 2009, the jury returned a guilty verdict on all counts. The district court sentenced Davis to a term of life imprisonment plus 420 months. Davis timely appealed the district court's denial of his motion to suppress and grant of the government's motion to exclude expert testimony.

II.

As the majority explains, Davis argues the district court committed reversible error in denying his motion to suppress DNA evidence. He contends that the following separate Fourth Amendment violations led to the "cold hit" match that implicated him in the Schwindler murder.[3] ***262** First, Davis argues that the initial nonconsensual, warrantless seizure of the bag of clothing from Howard County General Hospital by the HCPD in 2000 violated his Fourth Amendment rights. Second, he contends that the related, subsequent nonconsensual, warrantless search of the bag was unlawful, rendering all further uses of the evidence derived therefrom inadmissible as "fruit of the poisonous tree." Third, he asserts that PGCPD officials violated the Fourth Amendment when they extracted and chemically analyzed a sample of his DNA from the clothing without consent or a warrant in 2004. Fourth, Davis contends that the nonconsensual, warrantless uploading and retention of his DNA profile in the local CODIS database constituted yet a further Fourth Amendment violation. Of these four alleged violations, the district court found that only the retention of Davis's DNA profile in the CODIS database constituted a Fourth Amendment violation, although it ultimately concluded that applying the exclusionary rule was not appropriate on the basis of the good-faith exception.

The majority agrees with the district court's analysis in significant part. In particular, the majority agrees that the warrantless seizure of the bag containing Davis's clothing, as well as the subsequent, distinct search of the bag, and the subsequent seizure of the contents of that bag, resulting in the extraction of Davis's biological material, all may be justified on the basis of the plain view seizure exception to the warrant clause of the Fourth Amendment. I respectfully dissent from that extraordinary holding. The plain view exception does not apply under the circumstances in this case. Furthermore, even if it could be applied in some plausibly recognizable manner, the plain view seizure doctrine could not possibly justify the separate search of the bag containing Davis's clothing. Accordingly, the majority's substantive Fourth Amendment analysis is fatally flawed, quite apart from its unwarranted refusal to apply the exclusionary rule.

A.

As the district court correctly observed, *Davis,* 657 F.Supp.2d at 636, the government bears the burden of proving, by a preponderance, the legality of the search and seizure of evidence obtained without a warrant (or evidence derived therefrom) which it intends to introduce at trial. *See Welsh v. Wisconsin,* 466 U.S. 740, 749–50, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984) (exigent circumstances); *United States v. Mendenhall,* 446 U.S. 544, 557, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980) (consent); *United States v. Matlock,* 415 U.S. 164, 177 n. 14, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974) (same); *cf. Illinois v. McArthur,* 531 U.S. 326, 338, 121 S.Ct. 946, 148 L.Ed.2d 838 (2001) (Souter, J., concurring) ("[M]ost states follow the rule which is utilized in the federal courts: if the search or seizure was pursuant to a warrant, the ***263** defendant has the burden of proof; but if the police acted without a warrant the burden of proof is on the prosecution.") (quoting 5 W. LaFave, Search and Seizure § 11.2(b), p. 38 (3d ed.1996)). In assessing a trial court's ruling on a motion to suppress, we review factual findings for clear error and legal determinations, including "determination[s] of whether the historical facts satisfy a constitutional standard," de novo. *United States v. Gwinn,* 219 F.3d 326, 331 (4th Cir.2000); *see also Ornelas v. United States,* 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); *United States v. Wilson,* 484 F.3d 267, 280 (4th Cir.2007). When a motion to suppress has been denied in the court below, we review the evidence in the light most favorable to the government. *United States v. Seidman,* 156 F.3d 542, 547 (4th Cir.1998).

B.

The HCPD's original nonconsensual, warrantless procurement of Davis's bloody boxer shorts and pants in 2000 requires that we decide whether the district court erred in its legal conclusion that Detective King was entitled to both seize the bag containing the clothing and to search its contents without consent and in the absence of a judicial warrant. Echoing the district court's analysis, the majority concludes that Detective King was justified in seizing the bag because he had "lawful access" to it and because it was "immediately apparent" to him, and would have been so to any reasonable officer in his position, that the bag contained Davis's pants and that the pants contained a bullet hole, i.e., evidence of a crime. Maj. Op. at 235–37. The majority further elaborates its unique reconception of the longstanding plain view seizure doctrine by concluding that King was justified in searching the bag's contents, without obtaining Davis's consent or a warrant, because it was a "foregone conclusion" that the bag contained evidence of a crime. Maj. Op. at 235, 236–37 (relying upon *Williams,* 41 F.3d 192).

The majority's analysis is deeply flawed. As I explain in subsection II.B.1, application of rudimentary and long-established Fourth Amendment principles demonstrates that Detective King's seizure of the bag from Davis's possession violated Davis's Fourth Amendment right to be free of an unreasonable seizure of his personal "effects" and cannot be shoehorned into a plain view seizure analysis. Furthermore, as I show more specifically in subsections II.B.2 and II.B.3, long-settled understandings of the plain view seizure doctrine demonstrate that under no reasonable interpretation of the facts found by the district court can it be said that the nonconsensual, warrantless search of the bag was justified under that doctrine. As I demonstrate, neither *Williams,* nor any other precedent cited to us by the government supports, let alone compels, the remarkable application of the plain view seizure doctrine engaged in by the majority.

1.

It is common ground among the panel that a well-established exception to the Fourth Amendment's warrant requirement provides that a law enforcement officer may seize evidence in "plain view" without a warrant where (1) the officer is lawfully located in a place from which the item can plainly be seen; (2) the officer has a lawful right of access to the item itself; and (3) the incriminating nature of the seized item is immediately apparent. *See Horton v. California,* 496 U.S. 128, 136–37, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990). As this test makes clear, the intrusions implicated by the first two prongs of the test must be *lawful.* In other words, in both viewing the item to be seized and in actually taking ***264** physical possession of it, police must not infringe constitutionally protected privacy or possessory interests in the absence of a warrant or other well-recognized exception to the warrant requirement. *See Texas v. Brown,* 460 U.S. 730, 738–39, 103 S.Ct. 1535, 75 L.Ed.2d 502 (opining that "plain view" should not be considered an independent exception to the warrant requirement, but rather an extension of a prior justification for an officer's "access to an object") (plurality opinion); *see also Horton,* 496 U.S. at 137 n. 7, 110 S.Ct. 2301 (explaining that the lawful right of access requirement is "simply a corollary of the familiar principle ... that no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances' ") (quoting *Coolidge v. New Hampshire,* 403 U.S. 443, 468, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) (plurality opinion)).

In addition, the item's incriminating nature must be "immediately apparent" at the time the police view it, meaning that there is a "practical, nontechnical probability that incriminating evidence is involved." *Brown,* 460 U.S. at 742, 103 S.Ct. 1535 (internal quotation marks omitted); *see also Minnesota v. Dickerson,* 508 U.S. 366, 375, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993) ("If ... the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object—i.e., if its incriminating character is not immediately apparent, *Horton,* 496 U.S. at 136, 110 S.Ct. 2301—the plain-view doctrine cannot justify its seizure.") (internal quotation marks and brackets omitted); *Soldal v. Cook County, Illinois,* 506 U.S. 56, 66, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992) (explaining that " 'plain view' seizures ... can be justified only if they meet the probable-cause standard").

The government has failed to meet its burden here to establish that the seizure of the bag containing Davis's clothing can be justified by application of the plain view seizure doctrine, and the subsequent search of the bag could never be justified by the plain view seizure doctrine in any event, no matter how much evidence the government could muster.

There is no dispute that Detective King was lawfully present in the emergency room where Davis was being treated, and thus viewed the bag from a lawful vantage point. There is a constitutionally cognizable distinction, however, between the emergency room generally and the more narrowly delineated area beneath Davis's bed where the bag had been stored. Thus, the majority fails (or simply refuses) to recognize that although this case does not involve the paradigmatic factual scenario in which police view an item through a window before entering a premises to retrieve it, *see* Maj. Op. at 233–34, the lawful vantage point and lawful access prongs do not necessarily rise and fall together. Rather, there are distinct possessory and privacy interests implicated by the facts before us, namely the specific location of the bag and the fact that it contained non-contraband personalty or, to use the constitutional parlance, Davis's constitutionally protected "effects."

As a matter of law, Davis never relinquished his possessory rights in his effects prior to their seizure. *See United States v. Neely,* 345 F.3d 366, 369 & n. 4 (5th Cir.2003) ("[A]n emergency room patient does not forfeit his possessory rights to clothing simply by walking (or in many cases being carried) through the hospital door.") (collecting cases). Howard County General Hospital personnel ensured that

Davis's clothing was in his *immediate personal possession and control* when they placed it in a bag on the shelf directly ***265** beneath his bed. *See People v. Yaniak,* 190 Misc.2d 84, 738 N.Y.S.2d 492, 495–96 (N.Y.Co.Ct.2001) ("[T]he placing of the garments in the green plastic bag by hospital personnel evinced an objective belief that the items were still the personal property of the defendant and that, when he felt better, they would be returned to him.").

Of course, Davis would have retained his possessory interest in the clothing (and thus the bag containing the clothing), as well as his residual privacy interest in his clothing,[4] even if the hospital had safeguarded it in some other location. *See Neely,* 345 F.3d at 370 (explaining that once clothing is taken from the patient and secured by hospital employees, the hospital becomes a bailee and employees have no authority to permit police to retrieve the clothing without a warrant) (citation omitted). In addition, there is no evidence that Davis abandoned his clothing or that he consented to the seizure. Accordingly, under the circumstances, the police no more had "lawful access" to the bag containing Davis's clothing as he lay in the hospital receiving treatment than they would have had if the bag had been locked in a cabinet for patients' belongings or, indeed, held in Davis's hands while he was being treated.[5]

Manifestly, an officer's physical access to a citizen's non-contraband personalty in the possession of the citizen is not equivalent to an officer's "lawful access" to that personalty under the plain view doctrine. In other words, the mere existence of ***266** probable cause to believe a container in the possession of a citizen holds evidence of criminal activity, where the evidence is not contraband, is not alone sufficient to effect a warrantless seizure of that container from the possession of the citizen.[6]

As Davis correctly argues, and as the district court acknowledged, "A warrantless seizure is 'per se unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions' to the warrant requirement. *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnotes omitted); *Flippo v. West Virginia,* 528 U.S. 11, 13–14, 120 S.Ct. 7, 145 L.Ed.2d 16 (1999) (same)." Appellant's Br. at 21; *see Davis,* 657 F.Supp.2d at 636. The plain view seizure doctrine does not supplant the need for such an exception where an officer intrudes upon constitutionally protected privacy or possessory interests in physically retrieving the item to be seized from the person of its owner. *See Horton,* 496 U.S. at 137, 110 S.Ct. 2301 ("[N]ot only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself."); *Jones v. State,* 648 So.2d 669, 678 (Fla.1994) (explaining that the lawful access requirement "ensures that the scope of the intrusion into Fourth Amendment rights is no greater than that already authorized in connection with the lawful entry"); *see also infra* pp. 275–76 (explaining why seizures of containers holding "mere evidence" are distinguishable from containers holding contraband). Accordingly, in the absence of a recognized justification (e.g., exigent circumstances, which the district court did not find applicable) for intrusion upon Davis's protected interests, Detective King could not lawfully seize the bag under the plain view seizure doctrine from Davis's possession without a warrant or consent, irrespective of whether it was "immediately apparent" that the clothing suspected of being contained ***267** therein constituted evidence of a crime.[7] As the government accurately describes the relevant circumstances, "the [bag containing the] clothing was readily accessible to Detective King," Govt's Br. at 33–34, but that most assuredly does not mean that Detective King had "lawful access" to the bag or the clothing contained therein under the plain view seizure doctrine.

2.

Of course, even if Detective King could conceivably, on some theory, lawfully seize the bag, that does not mean that he could inspect its contents, i.e., search the bag, without obtaining Davis's consent or a judicial warrant.[8] "Even when government agents may lawfully seize such a package to prevent loss or destruction of suspected contraband [or mere evidence], the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package," *United States v. Jacobsen,* 466 U.S. 109, 114, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984) (brackets added), or otherwise satisfy one of the exceptions to the warrant requirement. *Horton,* 496 U.S. at 141 n. 11, 110 S.Ct. 2301. In other words, as Judge Niemeyer (who, three years earlier, ***268** had been a member of the panel in *Williams*) has cogently explained, "The 'plain-view' doctrine provides an exception to the warrant requirement for the *seizure* of property, but it does not provide an exception for a search." *United States v. Jackson,* 131 F.3d 1105, 1108 (4th Cir.1997) (emphasis in original); *accord United States v. Rumley,* 588 F.3d 202, 205 (4th Cir.2009).

Only in a very limited subset of cases involving "closed, opaque container[s]" may an officer open the container without first obtaining a warrant or the owner's consent, *Robbins v. California,* 453 U.S. 420, 426, 101 S.Ct. 2841, 69 L.Ed.2d 744 (1981) (plurality opinion), at least where, as here, the container is not located in a vehicle. One exception to the search warrant requirement in this context is in cases involving exigency. *See Chadwick,* 433 U.S. at 15 n. 9, 97 S.Ct. 2476 ("Of course, there may be other justifications for a warrantless search of luggage taken from a suspect at the time of his arrest; for example, if officers have reason to believe that luggage contains some immediately dangerous instrumentality, such as explosives, it would be foolhardy to transport it to the station house without opening the luggage and disarming the weapon.").[9] Another exception, the one the district court and the majority erroneously rely on, is for "containers (for example a kit of burglar tools or a gun case) [that] by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance." *Sanders,* 442 U.S. at 764 n. 13, 99 S.Ct. 2586. In those cases, because "the distinctive configuration of [the] container proclaims its contents," the owner of the container has no reasonable expectation of privacy in those contents, *Robbins,* 453 U.S. at 427, 101 S.Ct. 2841 (plurality opinion)—and thus an officer's observation of those contents does not constitute a separate "search" for Fourth Amendment purposes. *See Illinois v. Andreas,* 463 U.S. 765, 771, 103 S.Ct. 3319, 77 L.Ed.2d 1003 (1983) ("If the inspection by police does not intrude upon a legitimate expectation of privacy, there is no 'search'...."). In such cases the shape and/or character of the container, including where relevant its labeling, even if closed and opaque, is constitutionally equivalent to one that is open or transparent, because it "clearly reveal[s] its contents." *Id.; see also Arizona v. Hicks,* 480 U.S. 321, 328, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987) ("[A] truly cursory inspection—one that involves merely looking at what is already exposed to view, without disturbing it—is not a 'search' for Fourth Amendment purposes, and therefore does not even require reasonable suspicion."); *United States v. Payne,* 181 F.3d 781, 787 n. 4 (6th Cir.1999) ("There is no such thing as a 'plain-view search.' ").[10]

***269** We have carefully limited the scope of this "proclaims its contents" exception to cases where the incriminating nature of the contents is a "foregone conclusion." *See Williams,* 41 F.3d at 192; *see also Sanders,* 442 U.S. at 764 n. 13, 99 S.Ct. 2586 (requiring that the container's owner not maintain "*any* reasonable expectation of privacy" in the contents) (emphasis added).[11] Indeed in *United States v. Corral,* 970 F.2d 719 (10th Cir.1992), on which *Williams* principally relied, the court found that no search occurred only because there was a "virtual certainty" that the package contained, in that case, cocaine. *Id.* at 726 (quoting *Brown,* 460 U.S. at 751 n. 5, 103 S.Ct. 1535 (Stevens, J., concurring in the judgment)). The obviousness of a container's contents must be such that an officer's view of the container is "*equivalent* to the plain view" of the incriminating contents themselves. *Id.* (emphasis added).[12] The analogy we used ***270** in *Williams* illustrates both the centrality to the plain view seizure doctrine of the character of the container and the high degree of certainty required: "[W]hen a person opens a Hershey bar, it is a foregone conclusion that there is chocolate inside." 41 F.3d at 198; *see also Brown,* 460 U.S. at 750–51, 103 S.Ct. 1535 (Stevens, J., concurring in the judgment) (concurring in the application of the exception because the container there—a knotted party balloon located in a car close to several small plastic vials, quantities of loose white powder, and an open bag of party balloons—was "one of those rare single-purpose containers which 'by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance' "). Only if the character of a closed, opaque container proclaims its incriminating contents to such a degree do we excuse officers from obtaining a search warrant to open the container, assuming the officer has lawfully come into possession of the container.[13]

The above principles reflect the longstanding interplay between the two separate interests at stake: citizens' interest in retaining possession of their property and their interest in maintaining personal privacy. These two interests roughly correspond to seizures and searches, respectively, as "[a] seizure threatens the former, a search the latter." *Brown,* 460 U.S. at 747, 103 S.Ct. 1535 (Stevens, J., concurring in the judgment). This distinction, in turn, informs the plain view seizure doctrine in this context. As Justice Stevens has explained,

> As a matter of timing, a seizure is usually preceded by a search, but when a container is involved the converse is often true. Significantly, the two protected interests are not always present to the same extent; for example, the seizure of a locked suitcase does not necessarily compromise the secrecy of its contents, and the search of a stopped vehicle does not necessarily deprive its owner of possession.

Id. at 747–48, 103 S.Ct. 1535.

Apart from the special concerns arising from seizures of containers, we allow police officers to seize incriminating *objects* in ***271** plain view with a showing only of probable cause because the seizure "threatens only the interest in possession;" such objects "can be seized without compromising any interest in privacy." *Id.* at 748, 103 S.Ct. 1535. "[I]f an officer has probable cause to believe that a publicly situated item is associated with criminal activity" the owner's interest in possession is "diminish[ed]," and becomes "outweighed by the risk that such an item might disappear or be put to its intended use before a warrant could be obtained," and the object may be seized without a warrant. *Id.* (citing *G.M. Leasing Corp. v. United States,* 429 U.S. 338, 354, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977); *Payton v. New York,* 445 U.S. 573, 587, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980)).

Where there is a "link" between the seizure and "a prior or subsequent search," however, there is a "danger ... that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will." *Id.* Averting that danger requires not only that the officer have probable cause to connect the item with criminal behavior, but also that the seizure "entail[s] no significant additional invasion of privacy." *Id.* This danger is particularly acute where, as here, "an officer comes upon a container in plain view and wants both to seize it and to examine its contents." *Id.* at 749, 103 S.Ct. 1535. The Court has "emphasiz[ed] the Fourth Amendment privacy values implicated whenever a container is opened." *Id.*

3.

In light of these controlling principles, the dispositive issues bearing on the applicability of the plain view seizure doctrine before the district court were fairly straightforward. Given the above concerns, the issues can be easily framed: Could the government justify Detective King's nonconsensual, warrantless seizure of the bag, a closed, opaque container, on the one hand? Relatedly (but distinctly), did King's immediate opening of such a container constitute a "non-search" (because it does not invade its owner's reasonable expectation of privacy) or, instead, an impermissible warrantless search, on the other hand? Although the district court and the majority of the panel conclude that our *Williams* precedent provides easy answers to those questions, upon a close view of the facts in *Williams* and in light the precedents discussed above, it is clear that the majority's reliance on that case is wholly misplaced.

In *Williams,* an airline employee conducted a private search of the defendant's luggage and found several cellophane-wrapped packages that, according to her, "looked like dope." 41 F.3d at 198. She alerted police officers, who seized the packages and then removed some of the content, conducting a chemical field test that revealed that the packages contained cocaine. *Id.* at 194. The seizure was proper under the plain view doctrine, we concluded, because not only did the officers have lawful access to the packages; there was "no doubt" of the packages' "incriminating nature": "the packages were wrapped in heavy cellophane with a brown opaque material inside, and were found with towels, dirty blankets and a shirt in an otherwise empty suitcase." *Id.* at 196–97. In fact, the seizing officer later testified that "in his ten years of experience such packages *always* contained narcotics." *Id.* at 197 (emphasis added).

We then turned to whether the police needed a warrant to remove any of the contents of the packages. To justify the warrantless search, we explained, the government must not only show there was probable cause the container contained evidence ***272** of a crime, but rather that, based on characteristics of the container itself and "the circumstances under which an officer [found] the container," the contents' incriminating nature was "a foregone conclusion." *Id.* at 197 (citing *Blair,* 665 F.2d at 507). We concluded that "the incriminating nature of the five packages found in Williams' suitcase was a foregone conclusion," given

> (1) the manner in which the cocaine was packaged (apparently weighing approximately one kilogram each, heavily wrapped in cellophane with a brown opaque material inside); (2) Detective Finkel's firm belief, based on his ten years' experience, that packages appearing in this manner always contained narcotics; (3) [the airline employee's] belief that the packages contained narcotics; and (4) that the only items found in Williams' suitcase besides the five packages of cocaine were towels, dirty blankets, and a shirt with a cigarette burn.

Id. at 198. Because the presence of illegal narcotics in the packages was a foregone conclusion, Williams had no reasonable expectation of privacy in those contents. Accordingly, under the venerable Katz principle, *see Katz v. United States,* 389 U.S. 347, 361, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring), the officers' observation of those contents did not constitute a "search," and thus "a search warrant was unnecessary." *Williams,* 41 F.3d at 198;

See Jackson, 131 F.3d at 1108 (reaffirming that no "search" occurs when the plain view seizure doctrine properly applies to the contents of an opaque container).

Simply put, despite the majority's labored efforts to the contrary, this case is not *Williams* or *Corral.* Most important, under a proper plain view seizure analysis, it cannot be said that a reasonable officer in King's position had "knowledge approaching certainty," *Corral,* 970 F.2d at 725, that the bag under Davis's hospital bed contained evidence of a felonious shooting in which Davis was a "victim."[14] The district court and the majority treat the bag of Davis's clothing as analogous to the cellophane-wrapped cocaine in *Williams. See* Maj. Op. at 236 (holding that "the totality of the circumstances ... support[s] the determination that it was a foregone conclusion the bag under Davis' hospital bed contained the clothing he wore when he was shot," and that the clothing was evidence of a crime). I disagree.

As a matter of law, based on what was known by the officers after they attempted to interview Davis at the hospital, the likelihood that the bag contained probative evidence of a felonious shooting in which Davis was a victim does not rise to the level of probable cause. In the first place, there is unwarranted confidence shown by the district court and the majority that Davis's pants would contain a bullet hole. *See id.* at 236–37 ("We have little trouble, however, in concluding that Davis' pants would contain a bullet hole, and would thus be incriminating evidence in the prosecution of his assailant. Such a conclusion is based on the circumstances, Davis' appearance, and the location of his bullet wound."). The facts of *United States v. Jamison,* 509 F.3d 623 (4th Cir.2007), illustrate why this confidence is misplaced.

***273** The defendant in *Jamison* was a felon who accidentally shot himself in the groin area with a gun he had been carrying in his waistband. 509 F.3d at 625. Like Davis here, when Jamison was transported by his associates to the hospital for treatment, he relayed to investigating officers a fanciful falsehood that he was the victim of an attempted robbery. *Id.* at 626. The investigating officer noticed Jamison's clothing on a chair in the treatment room and confirmed by the absence of a bullet hole in Jamison's pants that Jamison was lying about the circumstances surrounding how he was shot.[15] *Id.* It was far from "a foregone conclusion" that, apart from the likely presence of blood on Davis's clothing, the contents of the bag would serve as useful evidence in the prosecution of an illusory "shooter" about whom Davis would provide no information. Indeed, the photograph in the record of Davis's high-thigh wound depicts a wound that is entirely consistent with one that would be suffered from an accidental discharge of a weapon by someone carrying a firearm in his waistband.

Equally important, there can be scant doubt that, in view of Davis's refusal to cooperate with the officers who responded to the hospital to investigate, the HCPD officers fairly quickly turned their attention to Davis as a suspect in criminal activity, just as Jamison quickly became a suspect in his own shooting. Indeed, even the government contends on appeal (contrary to the majority's facile attempt to show that in seizing Davis's personal property the Howard County police were seeking to "protect" Davis), that the police appropriately deemed Davis to be "not an innocent crime victim." Govt's Br. at 46–47 n. 13. *But see Davis,* 657 F.Supp.2d at 640 ("Davis was positively the victim of a violent crime.").

The actions of the officers in searching the car in which Davis was transported to the hospital and in eventually arresting Davis and his friend bear out this highly likely scenario. Indeed, the facts of this case show that because Davis used a falsely made District of Columbia driver's license bearing his photograph under the alias "Gary Edmonds," the only way in which the HCPD could reliably identify Davis was to arrest him and take his fingerprints. That is exactly what they were determined to do and that is exactly what they did. In short, even the investigating officers did not believe Davis was a victim; rather, they were investigating his possible involvement in criminal activity. Thus, rather than accept uncritically the officers' post hoc rationalization that they needed Davis's clothing to prosecute the unknown person who allegedly shot him, under the circumstances of this case, "[w]e should be reiterating the usual exhortation: 'Get a ***274** warrant.' " *United States v. Norman,* 701 F.2d 295, 302 (4th Cir.) (Murnaghan, J., concurring), *cert. denied,* 464 U.S. 820, 104 S.Ct. 82, 78 L.Ed.2d 92 (1983).[16]

As should thus be apparent, the "incriminating" nature of the contents of the bag here was nowhere close to being so obvious that no "search" occurred—unlike in *Williams.* In *Williams,* the drug packaging at issue was so readily recognizable that even a lay person, the airline employee who originally opened the baggage, testified that she immediately reported her discovery because "the bags looked like dope." *See* 41 F.3d at 198 (noting that "[b]ecause Lee is a layperson, not trained in law enforcement, her belief that the five packages contained 'dope' strongly supports the district court's conclusion that the contents of the packages were a foregone conclusion"). The hearing testimony in this case

did not indicate that the bag was distinctive in any way; thus, the government did not satisfy its burden on that issue. Indeed, the district court noted that "[t]here was no testimony as to whether the bag was open or closed, or whether it was transparent, opaque, or somewhere in-between." *Davis,* 657 F.Supp.2d at 638. Neither Detective King nor Lieutenant Lampe was able to provide a description of the bag beyond Lieutenant Lampe's comment that it was probably plastic.

Moreover, the *Williams* court emphasized Detective Finkel's testimony that, based on his ten years of experience in narcotics enforcement, packages of the sort at issue "*always* " contain narcotics. 41 F.3d at 198 (emphasis in original). In this case, Detective King testified on cross-examination that "the hospital makes a practice to secure any property that they take. Clothing from a victim, they place it under their bed." J.A. 147. When asked the follow up question, "So you're familiar it's the hospital's practice to secure that clothing in a white opaque plastic bag; is that correct?," Detective King responded, "It's been in different things. Sometimes it all depends on if somebody bags it or not." *Id.* In addition, as stated *supra,* neither Detective King nor Lieutenant Lampe was able to describe the bag. Detective King's testimony clearly does not ***275** rise to the level of familiarity or certainty expressed by Detective Finkel in *Williams.* Manifestly, it does not rise to Justice Stevens's "virtually certain" metric. The government's evidence of the nature of the bag and the surrounding circumstances was equivocal at best, and clearly did not rise to the level of virtual certainty that the bag would contain contraband, which the government would have to show to establish that no "search" of the bag's contents occurred.

Williams is also inapposite on its facts in two additional meaningful respects, such that the case does not support, let alone dictate, the result reached by the majority. First, the *Williams* court, in language and reasoning that was wholly unnecessary to the outcome of its analysis, considered not only the extrinsic evidence of the contents of the packages, but *also* the physical appearance and character of the packages to bolster its conclusion, whereas the district court in this case considered *only* extrinsic evidence. Considering only extrinsic evidence, and not the physical appearance and character of the container itself, takes the "foregone conclusion" analysis too far from the origins of the plain view seizure container exception acknowledged in *Sanders* footnote 13, in which the Supreme Court provided the quintessential examples of a single-purpose container, namely "a kit of burglar tools or a gun case." 442 U.S. at 764 n. 13, 99 S.Ct. 2586. The *Sanders* Court noted that the contents of such containers "can be inferred from their outward appearance." *Id.* Narcotics packaging is so readily recognizable as to rise to the level of the archetypal kit of burglar tools or a gun case. A non-descript plastic bag does not so betray its contents.[17]

Second, and critically, the search in *Williams* was a search for contraband and not mere evidence of someone's criminal act.[18] For the reasons expressed above, *see supra* pp. 264–65, in addition to his possessory interest in the bag and its contents, Davis clearly enjoyed a reasonable expectation of privacy in his own clothing and their contents every bit as much as he enjoyed a reasonable expectation of privacy, as the majority rightly holds, in the ***276** chemical facts concerning his biological material and blood.[19] Indeed, it is curious, to say the least, to reason as does the majority that Davis retained, for several years after the bag was seized at the hospital, a reasonable expectation of privacy in the character of his DNA molecules, but that he lacked any reasonable expectation of privacy in the presence of those molecules in his blood while they were embedded in his clothing and hidden from the government in a bag which was effectively in his actual possession at the hospital. Thus, I would limit *Williams* and its reliance on extrinsic indicia of the container's contents to cases involving the plain view seizure of containers holding contraband.

For all these reasons, *Williams* does not control the outcome in this case.[20]

C.

For the foregoing reasons, unlike the majority, I would hold, at minimum, that not only the extraction of Davis's DNA, the creation of his DNA profile and its retention in the local DNA database violated Davis's constitutional right to be free from unreasonable searches, but that the nonconsensual, warrantless search of the bag containing his personal effects likewise violated that right. Accordingly, I respectfully dissent from the majority's contrary resolution of the merits of the Fourth Amendment issue. "[T]he value of the Fourth Amendment derives from the consideration that only when it is applied evenhandedly—to smugglers, murderers, and rapists as well as to others—does it retain its effectiveness for the decent citizenry." *Norman,* 701 F.2d 295 at 302 ***277** (Murnaghan, J., concurring). I regret the majority's distortion

of the plain view doctrine in order to save the unconstitutional search challenged in this case.

III.

The majority, having concluded that only the extraction and analysis of Davis's DNA by the PGCPD violated the Fourth Amendment, and having assumed that the retention of his DNA in the local CODIS database was a further violation, nevertheless refuses to apply the exclusionary rule. I respectfully dissent from that choice. I would find that the district court erred in admitting evidence flowing from the HCPD's unlawful seizure and search of Davis's clothing and the PGCPD's unlawful extraction, analysis and retention of his DNA profile, including in particular the evidence of the match between the known sample obtained pursuant to the search warrant and DNA recovered from the scene of the Schwindler murder. Because this case does not fall within any version of the "good faith" exception recognized under extant Supreme Court or Fourth Circuit precedent, I would reject the district court's decision not to apply the exclusionary rule.

The Fourth Amendment protects the fundamental "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," U.S. Const. amend. IV, but "contains no provision expressly precluding the use of evidence obtained in violation of its commands," *Arizona v. Evans,* 514 U.S. 1, 10, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995). Thus, the Supreme Court created the exclusionary rule, an auxiliary to the Amendment which "compel[s] respect for the constitutional guaranty," *Elkins v. United States,* 364 U.S. 206, 217, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960), by forbidding the use of illegally obtained evidence at trial. *See Weeks v. United States,* 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914) (adopting federal exclusionary rule); *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) (applying exclusionary rule to the states through the Fourteenth Amendment). Suppression is not an automatic consequence of all Fourth Amendment violations, however. *See Herring v. United States,* 555 U.S. 135, 137, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009).

The Supreme Court created the "good-faith" exception to the exclusionary rule in *United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). In *Leon,* the Court held that the exclusionary rule does not apply when the police conduct a search in "objectively reasonable reliance" on a warrant later held invalid. *Id.* at 922, 104 S.Ct. 3405; *see also Massachusetts v. Sheppard,* 468 U.S. 981, 990–91, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984) (companion case declining to apply exclusionary rule where warrant held invalid as a result of judge's clerical error). In the twenty-eight years since deciding *Leon,* a sharply-divided Supreme Court has applied variations on the *Leon* good-faith exception in several specific circumstances. In *Illinois v. Krull,* 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987), the Court applied the good-faith exception to a search conducted in reasonable reliance on a subsequently invalidated statute. *Id.* at 349–50, 107 S.Ct. 1160. In *Evans,* 514 U.S. 1, 115 S.Ct. 1185, the Court applied the good-faith exception where police reasonably relied on erroneous information concerning an arrest warrant in a database maintained by non-law enforcement, judicial employees. *Id.* at 6, 14–16, 115 S.Ct. 1185.

More recently, in *Herring,* decided approximately nine months prior to the district court's decision in this case, the Supreme Court addressed a question left ***278** unresolved by *Evans,* namely "whether the evidence should be suppressed if police personnel were responsible for the error." 555 U.S. at 142–43, 129 S.Ct. 695 (quoting *Evans,* 514 U.S. at 16 n. 5, 115 S.Ct. 1185) (internal quotation marks omitted). Considering whether the exclusionary rule applies where police failed to update records in a warrant database, leading to the unlawful arrest of the defendant on the basis of a recalled warrant, the *Herring* Court held, over a spirited dissent, that where "the error was the result of isolated negligence attenuated from the arrest ... the jury should not be barred from considering all the evidence." *Id.* at 137–38, 129 S.Ct. 695. The Court reasoned that, "when police mistakes are the result of negligence ..., rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not pay its way." *Id.* at 147–48, 129 S.Ct. 695 (internal quotation marks omitted). Most recently, the Court in *Davis v. United States,* —— U.S. ——, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011), applied a further variation on the *Leon* good-faith exception where police conducted a search in objectively reasonable reliance upon binding judicial precedent that was later overruled. *Id.* at 2423–24.

The majority reasons that, "[i]n order to properly apply *Leon, Herring*, and *Davis* here, we must focus on the culpability of the actors who committed the violations." Maj. Op. at 253. The majority assumes without discussion that *Leon* and its progeny govern here, and thus proceeds directly to the broad cost-benefit analysis that underlies the narrow holdings in those cases. As discussed *infra,* however, each of the cases upon which the majority relies is clearly distinguishable

from the case at bar. Thus, the majority's application of the good-faith exception to preclude suppression in this case marks a departure from the Supreme Court's exclusionary rule precedents and represents a new, free-standing exception never sanctioned by the Court or by precedent in this Circuit.

In *Leon, Krull, Evans* and *Davis,* the Supreme Court reasoned that exclusion does not serve to deter unconstitutional police conduct where the actor primarily responsible for the Fourth Amendment violation is not a law enforcement officer. *See Leon,* 468 U.S. 897, 104 S.Ct. 3405 (magistrate judge); *Krull,* 480 U.S. 340, 107 S.Ct. 1160 (legislators); *Evans,* 514 U.S. 1, 115 S.Ct. 1185 (clerk in the employ of the judiciary); *Davis,* 131 S.Ct. 2419 (judiciary). This rationale clearly does not apply here, where HCPD and PGCPD employees violated the Fourth Amendment. In this respect, our case is most like *Herring,* which also dealt with unconstitutional conduct by law enforcement personnel. Nevertheless, *Herring* is likewise inapplicable because it crafted a narrow exception to the exclusionary rule that applies only where "the error was the result of isolated negligence attenuated from arrest." 555 U.S. at 137, 129 S.Ct. 695. The majority fails to recognize that neither of the qualifiers present in *Herring,* namely "isolated negligence" and "attenuation," is present here.

Instead, the record in our case shows unmistakably that the constitutionally violative conduct is not only deliberate and intentional but is systemic; most assuredly, it was not an isolated blunder. Detective King testified that, as on previous occasions when he has responded to Howard County General Hospital to investigate shootings, hospital personnel did not assist him in obtaining Davis's effects. This statement indicates that Detective King has seized patients' belongings in the manner at issue here on other occasions. *See supra* n. 11. In addition, the DNA analyst ***279** who entered Davis's profile into the local CODIS database testified that she was aware that Davis had been cleared of suspicion in the Neal murder before his DNA profile was added to the local CODIS database.

Furthermore, the "Request for Examination" form submitted to the PGCPD Serology DNA Laboratory ("DNA Lab") along with Davis's bloody clothing indicated that "these samples are from a shooting the suspect was a victim of in Howard Co. MD." Supp. J.A. 76. The DNA analyst testified that the database contained profiles of both suspects and victims, indicating that the PGCPD regularly retained the DNA profiles of persons, such as Davis, who had not been arrested, charged with, or convicted of any crime. The government confirmed at oral argument that it was the PGCPD's policy to upload *every* DNA profile it analyzed into the local CODIS database, regardless of the individual's status, the method by which the sample was obtained, or whether the sample might be tainted by an antecedent constitutional violation. Oral Arg. Tr. at 28:40. Thus, the record indicates that the PGCPD analyst and officers knew that Davis was a victim at the time the sample was collected, that Davis was not a suspect when his DNA profile was entered into the local database, and that it was the PGCPD's policy and practice to retain the DNA profiles of such persons. Thus, by the government's own admission, the constitutionally violative conduct was clearly systemic. *See Hudson v. Michigan,* 547 U.S. 586, 604, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006) (Kennedy, J., concurring in part and concurring in the judgment) (opining that, "[i]f a widespread pattern of violations were shown, and particularly if those violations were committed against persons who lacked the means or voice to mount an effective protest, there would be reason for grave concern").

The expungement provisions in the Maryland and federal indexing statutes also recognize a privacy interest for those in Davis's position. As the district court recognized, "[b]oth laws require that an individual's DNA record be expunged from the database if the defendant is never convicted, his conviction is reversed or vacated, or the charges are dismissed." *Davis,* 657 F.Supp.2d at 659 (citing 42 U.S.C. §§ 14132(d)(1)(A)(i)-(ii); 42 U.S.C. §§ 14132(d)(2)(A)(i)-(ii); Md.Code Ann., Pub. Safety § 2–511). While "[t]he expungement provisions do not directly apply to Davis' situation because they are drafted specifically to address circumstances in which an individual's DNA was placed in the database on the basis of a conviction or arrest," I agree with the district court that "the construction of the statute strongly suggests that Congress and the Maryland legislature respected the privacy interest of those individuals never convicted for qualifying offenses, and did not intend for ordinary citizens' or victims' DNA to be included in the database." *Id.*

In addition, unlike the constitutionally violative conduct at issue in *Herring,* the conduct in this case is not "attenuated" from the discovery of Davis's identity as the source of the DNA recovered from the scene of the Schwindler murder; the cold hit which led to Davis's arrest was a *direct result* of the seizure and search of his clothing and the subsequent extraction, analysis and retention of his DNA profile. *Cf. Hudson,* 547 U.S. at 592, 126 S.Ct. 2159 (exclusionary rule inapplicable where violation of the knock and announce rule was not but-for cause of obtaining evidence pursuant to

search warrant). Given that the cold hit supplied the sole probable cause for the search warrant leading to the known DNA match, the causal connection required to invoke the exclusionary rule is clearly present in this case.

***280** As we recognized in *United States v. Oscar–Torres,* 507 F.3d 224 (4th Cir.2007), application of the exclusionary rule is the "usual remedy" where evidence of identity is derived from unlawful searches and seizures:

> Indisputably, suppression of evidence obtained during illegal police conduct provides the usual remedy for Fourth Amendment violations. *See Mapp v. Ohio,* 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Courts will also suppress evidence that is the indirect product of the illegal police activity as "fruit of the poisonous tree." *See Wong Sun v. United States,* 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Of course, not all evidence that "would not have come to light but for the illegal actions of the police" is suppressible as fruit of the poisonous tree. *Id.* Rather, the critical inquiry is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* (internal quotation marks omitted).

Id. at 227. There is no real dispute that the seizure of the bag containing Davis's clothing, the search of the bag and of Davis's clothing, including the extraction of his DNA therefrom, and the subsequent creation and uploading of his DNA profile, means that the identification evidence introduced at trial was the product of an "exploitation" of the searches and seizures at issue in this case.[21] Rather than noting the critical distinctions between our case and extant good-faith exception precedents, the majority invents an ad hoc version of the exception by focusing on broad principles espoused by the *Herring* Court, including most notably its admonition that the deterrent effect of exclusion must outweigh its costs. This is unsurprising, perhaps, given that the *Herring* Court's " 'analysis' ... far outruns the holding." Wayne R. LaFave, *The Smell of Herring: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule,* 99 J.Crim. L. & Criminology 757, 770 (2009). In other words, there is a gap between the holding of *Herring,* which is quite narrow, and its rationale, which sweeps quite broadly. We should not so readily depart from the narrow holding of *Herring,* and the Supreme Court's other good-faith exception jurisprudence, given the critical role that the exclusionary rule plays in ensuring the vitality of the Fourth Amendment.

The rule provides an essential "incentive for the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment," *Illinois v. Gates,* 462 U.S. 213, 221, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (White, J., concurring in judgment), thereby "safeguard[ing] Fourth Amendment rights generally through its deterrent effect," *United States v. Calandra,* 414 U.S. 338, 348, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). *See also Herring,* 555 U.S. at 152, 129 S.Ct. 695 (Ginsburg, J., dissenting) (describing exclusionary rule as a "remedy necessary to ***281** ensure that the Fourth Amendment's prohibitions are observed in fact") (internal quotation marks omitted); *cf. United States v. Jones,* 678 F.3d 293 (4th Cir.2012).[22]

In this case, the HCPD officers deliberately and intentionally dispossessed Davis of his personal property. The HCPD officers then deliberately and intentionally retained that property. Then, the HCPD deliberately and intentionally delivered that property to the PGCPD officers, who deliberately and intentionally made a request for it. Having thus obtained possession, the PGCPD officers then deliberately and intentionally delivered Davis's property to their DNA lab for analysis and uploading into the local CODIS database, and, of course, the analyst, charged with knowledge that she was handling biological material taken from a crime victim, deliberately and intentionally uploaded the DNA profile into the database. This case is a poor candidate for the creation of a new variation on the good-faith exception to the exclusionary rule.

Davis has been convicted of a heinous crime. The cold-blooded mid-day murder of Jason Schwindler, a man simply conscientiously going about his work to support himself and his family, understandably generates outrage and dismay, an all-too-common episode of modern life from which all decent people recoil in horror. There is little reason to doubt that customary, equally conscientious, work by dedicated state and federal law enforcement officers would have brought deserved justice to those who participated. Nevertheless, duty to the judicial oath requires that we apply the law faithfully and evenhandedly.[23]

In short, I would apply the exclusionary rule in this case and leave it to the Supreme Court to extend the good-faith exception to the particular situation now before us, should it see fit to do so. I am mindful that the obituary marking the long slow death of the exclusionary rule has been written long before the rule will be interred.[24] Understandably, perhaps,

there has been no want of volunteers among the judiciary to serve as pallbearers. I regret this development and fear that a measurable lessening in liberty will result from this freeing of law enforcement from the constraints of the Fourth Amendment through the invention of an ad hoc good-faith exception to suppression of unlawfully obtained evidence. To quote the second Justice Harlan, "I can see no good ***282** coming from this constitutional [mis]adventure." *Ker v. California,* 374 U.S. 23, 46, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963) (Harlan, J., concurring in the judgment).

For the reasons set forth, I respectfully dissent.

All Citations

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Footnotes

1 Specifically, Davis was convicted of Hobbs Act robbery, in violation of 18 U.S.C. § 1951, two counts of possession and discharge of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c), one count of possession and discharge of a firearm in furtherance of a crime of violence resulting in death, in violation of 18 U.S.C. § 924(j), and one count of carjacking, in violation of 18 U.S.C. § 2119.

2 CODIS is a linked system that allows local, state, and federal forensics laboratories the ability to exchange, share and compare DNA profiles electronically. *See United States v. Mitchell,* 652 F.3d 387, 399 (3d Cir.2011) (en banc).

3 The death penalty was originally sought in this case, but the district court held that Davis was ineligible for the death penalty because he meets the legal definition for mental retardation. That ruling is not challenged on appeal.

4 Although the parties and the district court sometimes referred to the two HCPD officers using their titles at the time of the suppression hearing, we use their titles in 2000, as described by them.

5 We use the term "DNA material" to refer to any physical body sample that contains deoxyribonucleic acid (DNA) identification information. *See* 42 U.S.C. § 14135a(c)(2) (defining DNA analysis for purposes of including DNA profiles in CODIS as the "analysis of [DNA] identification information in a bodily sample").

6 The parties are not clear in their briefs and do not point to any record evidence concerning what supported the PGCPD's suspicion that Davis was involved in the Neal murder. Nonetheless, we presume for purposes of this appeal that, whatever level of suspicion it was, it was insufficient to establish probable cause.

7 Davis was initially charged in Prince George's County Circuit Court and prosecution began there by the Prince George's County State's Attorney's Office. That office later dismissed the case against Davis in coordination with the U.S. Attorney's Office in favor of a federal prosecution. The testimony of the analyst before the Maryland court was attached as Exhibit H to the Government's Consolidated Response to Motions filed before the district court below.

8 Although not in evidence, there was a limited discussion at oral argument regarding what the common policy or practice was at that time. *See infra* at 254–55.

9 The accuracy of the DNA match is uncontested on appeal.

10 Before the district court, Davis' counsel argued six different points in which the Fourth Amendment could be implicated. On appeal, he limits his Fourth Amendment challenges to the three recited.

11 Relying on *United States v. Jackson,* 131 F.3d 1105, 1108 (4th Cir.1997), the dissent criticizes the majority opinion for its alleged failure to recognize that the plain view doctrine can justify a seizure, but not a warrantless search. *See generally post* at 267–69.

> We recognize and acknowledge, as explained in *Jackson,* that the plain view doctrine is not an exception to the warrant requirement for a Fourth Amendment search. 131 F.3d at 1108. Rather, the proper analysis is that there was a "non-search" here—for Fourth Amendment purposes—because no privacy interests were implicated. That is so because the police were justified in "searching" the bag of Davis' clothing because it was a foregone conclusion that the bag contained evidence of a crime; just as in *United States v. Williams,* upon which we rely, the police lawfully searched

a seized container because it was a foregone conclusion it contained evidence of a crime. 41 F.3d 192, 198 (4th Cir.1994). We describe the action of the police in either looking in the bag or cataloguing its contents as a "search," as that term is used in the non-technical sense, since that is the framework utilized by the parties, by the dissent, and by the court in *Williams. See id.* ("When a container has been legally seized, and its contents are a foregone conclusion, we hold that a subsequent search of the container is lawful under the plain view container doctrine."). To the extent there is an issue, it is more of labeling than of substance.

12 The government also contends that, even if the plain view exception did not apply, the clothing and DNA on it are not subject to exclusion because those items would have been discovered and seized upon Davis' arrest for narcotics violations as he left the hospital. The district court rejected this argument. *Davis,* 657 F.Supp.2d at 641. In light of our ruling that the plain view exception applies, we do not address the alternative argument of the government.

13 The dissent devotes considerable ink to disputing the lawful access prong, complete with hypotheticals unrelated to the situation in the case at bar. *See post* at 264–67 and corresponding notes. Context matters, however, and the context of this case is that of a police officer who was lawfully fulfilling his duty to investigate a reported shooting. In doing so, he lawfully entered the emergency room of a hospital to interview the victim of the shooting, and observed both the victim, unclothed from the waist down, lying on a gurney with a visible gunshot wound to his upper thigh, and a plastic bag of clothing underneath the victim's gurney. That context informs our conclusion that the officer had lawful access to the bag.

14 While the dissent appears to disagree with the holding of *Williams* in some respects, *see post* at 270 n. 13, 275, we are bound to follow our own Circuit's precedent "absent contrary law from an *en banc* decision of this Court or a Supreme Court decision." *United States v. Jeffery,* 631 F.3d 669, 677 (4th Cir.2011).

15 It is unsurprising that neither officer could remember, at the time of their testimony at the suppression hearing in September 2008, precisely what the plastic bag looked like given that they had seen it briefly more than eight years earlier, in August 2000.

16 Contrary to the dissent's unfounded claim that we are engaging in "extraordinary appellate fact-finding," *post* at 269 n. 12, we are simply quoting from the undisputed testimony of Officer King in the record. While the government bears the burden of proof to show that the warrantless seizure was justified, the district court ruled in the government's favor and thus any inferences to be drawn from the testimony are to be viewed in the light most favorable to the government. *Seidman,* 156 F.3d at 547. Moreover, nowhere in its brief does the government "concede" that King did not know it was clothing in the bag. *Cf. post* at 269 n. 12.

17 The dissent's lengthy discussion of *United States v. Jamison,* 509 F.3d 623 (4th Cir.2007), *see post* at 272–73 & n. 15, to suggest that a bullet hole might not have been present in Davis' pants, is unavailing. *Jamison* did not involve any challenge to the search or seizure of evidence; the issue there was whether the defendant was in custody for *Miranda* purposes at the time police questioned him. Moreover, the fact that it was theoretically possible, at the time that Officer King seized the clothing, that Davis was: a) lying about being shot by someone else and had instead shot himself; and b) done so in a manner that somehow avoided putting a hole in his own pants, does not alter our conclusion. As the Tenth Circuit has explained, the knowledge required to establish a "foregone conclusion" is not absolute certainty, but "knowledge *approaching* certainty." *United States v. Jackson,* 381 F.3d 984, 989 n. 2 (10th Cir.2004) (emphasis in original). That standard is met here.

18 The Fifth Circuit reasoned in *Chavis* that "[c]learly, the officer ... would have been derelict in his duty had he not taken custody of Chavis' clothing as evidence of a possible homicide that he was investigating." 488 F.2d at 1078; *see also Jamison,* 509 F.3d at 631–32 (in context of addressing interrogation and gun-powder residue testing of a hospital patient who was admitted with a gunshot wound, noting that a reasonable person who is admitted to a hospital with a gunshot wound and reports that he was shot by someone else would expect to be interviewed and "might complain of police malfeasance had [the police] *not* immediately investigated the shooting[,] [since a] reasonable person would tolerate nothing less than a thorough investigation into such a shooting").

19 The dissent cites *Clay v. State,* 290 Ga. 822, 725 S.E.2d 260 (2012), as a case in which a court concluded the plain view exception did not warrant the search of a bag of clothing. *See post* at 274 n. 16. Contrary to the dissent's description of *Clay* as having "nearly identical" facts, however, the defendant in *Clay* was an unconscious murder *suspect* at the time

the police reported to the hospital and conducted a search of the bag containing his personal effects. *See* 725 S.E.2d at 264–65. Significantly, there was no evidence in that case that the police knew there would be blood on his clothing or other evidence of any crime. Unlike Davis, the suspect had not been shot or assaulted and was not being treated for any wounds, nor were any wounds visible, that would indicate there would be blood on his clothing. *Id.* Under these circumstances, the court concluded that it was not a " 'foregone conclusion' that the bag contained [the suspect's] bloody clothes." *Id.* at 269. Here, by contrast, there was ample evidence in plain sight (including most notably the gunshot wound on Davis' upper thigh) from which Officer King could conclude it was a foregone conclusion that the bag contained Davis' clothing, and that the clothing contained evidence of a crime.

Moreover, while Davis and the dissent cite to decisions of other courts for the "unremarkable proposition" that hospital patients retain a reasonable expectation of privacy in their clothing, *see post* at 274 n. 16, that proposition is far from universally accepted. Indeed, other courts have found that a reasonable expectation of privacy was lacking under facts similar to those here and thus upheld the warrantless seizure and search of clothing belonging to a hospital patient. *See, e.g., Mitchell v. State,* 321 Ark. 570, 906 S.W.2d 307, 309 (1995) (affirming warrantless seizure of clothing from hospital and subsequent inventory search, explaining that "[t]he totality of the circumstances herein includes the fact that the appellant was thought to be a victim [and] [t]he clothing of a gunshot victim is evidence of the commission of a crime"); *Holt v. United States,* 675 A.2d 474, 477, 480 (D.C.1996) (Fourth Amendment was not violated by the search or the subsequent seizure of defendant's clothing from a "visible, unsealed plastic bag under [defendant's] gurney in which hospital personnel had stored [his] clothing before treating him" after defendant had admitted himself with a gunshot wound, particularly where he had "voluntarily walked into [the hospital] emergency room wearing—for everyone to see—the clothing the police later inspected" and he never expressed "a desire to remove [the clothing] from public view"); *People v. Sutherland,* 92 Ill.App.3d 338, 47 Ill.Dec. 954, 415 N.E.2d 1267, 1271 (1980) (gunshot victim whose clothes were removed at the hospital had no reasonable expectation of privacy in those clothes and thus they could be obtained and inspected without a warrant); *State v. Adams,* 224 N.J.Super. 669, 541 A.2d 262, 265 (N.J.Super.Ct.App.Div.1988) (exigent circumstances permitted the search and inspection of clothing taken from an unconscious hospital patient in the emergency room, who was believed to be the victim of a shooting); *Wagner v. Hedrick,* 181 W.Va. 482, 383 S.E.2d 286, 291 (1989) (motorcycle accident victim had no "reasonable expectation of privacy in his personal effects" under the control of emergency room staff).

20 Indeed, in gauging what is "readily recognizable," we think it likely that the vast majority of people who have spent time in a hospital (either as a patient or with a friend or family member) know that hospitals commonly place a patient's clothing in a plastic bag that either stays in his room or travels with him on his bed or gurney. On the other hand, most lay people do not have personal experience with the types of packaging used by drug traffickers. Regardless of which container hypothetically is more recognizable in the absence of context and personal experience, we readily conclude that the bag here was readily identifiable as containing Davis' clothing.

21 Because DNA is found in many bodily substances, *see Kaemmerling v. Lappin,* 553 F.3d 669, 682 (D.C.Cir.2008) ("DNA exists in numerous parts of the body that even nonviolent criminals leave behind, including hair, saliva, and skin cells....") (citation omitted), the mere fact that DNA material is present on a physical item of seized evidence cannot automatically infringe upon a person's privacy interest in his or her DNA. It is not until the DNA is tested and extracted and a DNA profile created that the privacy interest in DNA might be implicated. Put differently, it cannot be the rule that an otherwise lawful seizure of physical evidence becomes illegal merely because a non-perpetrator's DNA may be on that evidence.

22 In *Jones,* in the context of obtaining DNA profiles from incarcerated felons, we analogized DNA profiling to fingerprinting, *i.e.,* a more sophisticated or refined means of identification. 962 F.2d at 306–07; *see also Mitchell,* 652 F.3d at 413 ("at present DNA profiling is simply a more precise method of ascertaining identity and is thus akin to fingerprinting, which has long been accepted as part of routine booking procedures"); *see also United States v. Amerson,* 483 F.3d 73, 85–86 (2d Cir.2007) ("at least in the current state of scientific knowledge, the DNA profile derived from the offender's blood sample establishes only a record of the offender's identity" and "a probationer's expectation of privacy in his or her identity is severely diminished."); *Boroian v. Mueller,* 616 F.3d 60, 66–67 (1st Cir.2010) ("Given the [federal] DNA Act's stringent limitations on the creation and use of DNA profiles, CODIS currently functions much like a traditional fingerprint database" and citing to cases from the Second, Tenth, and District of Columbia Circuits so stating). However, courts also have recognized the limitations of this analogy, which stem from the fact that a DNA profile, unlike a fingerprint, is drawn from DNA that stores a wealth of personal information. *See Johnson v. Quander,* 440 F.3d 489, 499 (D.C.Cir.2006) ("genetic

fingerprints differ somewhat from their metacarpal brethren"); *United States v. Kincade,* 379 F.3d 813, 841–42 & n. 3 (9th Cir.2004) (en banc) (Gould, J., concurring) ("Like DNA, a fingerprint identifies a person, but unlike DNA, a fingerprint says nothing about the person's health, propensity for particular disease, race and gender characteristics, and perhaps even propensity for certain conduct.").

> In any event, both a thorough examination of the science of DNA profiling, as well as the operation and interplay of local, state, and federal DNA law enforcement databases, are far beyond the scope of this opinion. Other courts have examined these issues in detail and we will not do so here. *See, e.g., Mitchell,* 652 F.3d at 398–402 (discussing the process of creating a DNA profile for CODIS and the use of "junk" DNA, the federal DNA act and the levels of database that contribute to CODIS); *Boroian,* 616 F.3d at 63–64, 65–67 (explaining how DNA samples are obtained, summarizing the provisions of the federal DNA act, and describing how CODIS works and how the database has grown and expanded since its initial development).

23 The Supreme Court's recent decision in *United States v. Jones,* —— U.S. ——, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012) does not change our analysis in this case. In *Jones,* the Court held that the Fourth Amendment was violated when law enforcement officers, without a valid warrant, installed a GPS tracking device on the undercarriage of the defendant's Jeep while it was parked in a public parking lot. In determining whether this action constituted a "search," the majority did not reach the issue of whether the Defendant had a "reasonable expectation of privacy" in the underbody of the Jeep. *Id.* at 950. Instead, its conclusion rested entirely on the fact that the "Government physically occupied private property for the purpose of obtaining information," *id.* at 949, and that constituted a violation of the Fourth Amendment right "to be secure against unreasonable searches and seizures in their persons, houses, papers and effects." *Id.* In so holding, the Court emphasized that *Katz* simply established that "property rights are not the sole measure of Fourth Amendment violations," but that *Katz* did not extinguish the "previously recognized protection for property." *Id.* at 951; *see also id.* at 954–55 (Sotomayor, J., concurring). In the case at bar, once the police had lawful possession of Davis' clothing, there was no further intrusion of, or trespass upon, his property rights. Thus, the only basis on which the later testing of the clothing could constitute a search is if Davis retained a reasonable expectation of privacy in his clothing or the blood on it.

24 The government also relies on *United States v. Gargotto,* 476 F.2d 1009 (6th Cir.1973) and *Wallace v. State,* 373 Md. 69, 816 A.2d 883 (2003). In *Gargotto,* the Sixth Circuit held that a defendant's records seized in a state investigation could be given to federal authorities without a separate search warrant, and used as evidence in an unrelated federal case. 476 F.2d at 1014. Similarly, *Wallace* affirmed the warrantless search and visual inspection of the defendant's clothing in conjunction with a murder charge, where the clothing had been initially seized during an inventory search upon his arrest for drug charges, because the defendant had no reasonable expectation of privacy in that clothing. 816 A.2d at 897, 901. The district court considered *Wallace* and other similar cases, but found them all distinguishable on the grounds that the evidence in the other cases lawfully entered police custody pursuant to a defendant's arrest or was seized pursuant to a warrant supported by probable cause. *Davis,* 657 F.Supp.2d at 646. By contrast, Davis' pants with the bloodstain were in lawful police custody as evidence of a crime in which he was the reported victim. *Id.* at 647.

25 The *Boroian* court relies on *Amerson* as a case supporting this principle. 616 F.3d at 68. However, a careful reading of *Amerson* reflects that the Second Circuit found a reasonable expectation of privacy in the retention of a DNA profile in CODIS, and periodic matching of the profile, *see* 483 F.3d at 85 n. 12, 86, but ultimately concluded that the search was justified under the special needs test. *Id.* at 86–87 (upholding the federal DNA Act against Fourth Amendment challenges and "acknowledg[ing] that the DNA profile of appellants will be stored in CODIS, and potentially used to identify them, long after their status as probationers—and the reduced expectation of privacy that such a status involves—has ended," but concluding that fact did not "change [ ] the ultimate analysis.")

26 Even in cases where a person is subject to some type of criminal charge or restraint, there are varying viewpoints regarding the proper approach and its application. In the Ninth Circuit's *Kincade* case, which was heard en banc, a five-member plurality voted to uphold the federal DNA Act against a Fourth Amendment challenge and employed a totality of the circumstances test. 379 F.3d at 832 (en banc) (O'Scannlain, J., plurality opinion). Judge Gould, concurring in the result, voted to uphold the Act, but would have applied the "special needs" analysis. *Id.* at 840 (Gould, J., concurring). Five dissenting judges would have found a Fourth Amendment violation, but would have employed different approaches. *See id.* at 842–76 (dissenting opinions); *see also id.* at 830–31 (O'Scannlain, J., plurality opinion) (collecting authority and comparing cases which have applied a special needs test in the context of DNA profile collection and cases which

have applied a "totality of the circumstances" balancing test); *Mitchell,* 652 F.3d at 403 n. 15 (noting that only the Second and Seventh Circuits have consistently held that the special needs test should apply in addressing the constitutionality of a DNA indexing statute and concluding that the totality of the circumstances is the proper test).

27 In an alternative argument as to why the retention of Davis' DNA profile does not constitute a separate search, the government contends that once the district court had determined there was no Fourth Amendment violation in the extraction and testing of Davis' DNA from his clothing as part of the Neal investigation, Davis no longer had any expectation of privacy in the DNA profile. (Appellee's Br. at 50–51 (citing *Johnson v. Quander,* 440 F.3d 489, 498–99 (D.C.Cir.2006) and state court opinions).)

28 Neither party argues for the application of the "special needs" test here. We also conclude it should not apply here because it applies in contexts "beyond the normal need for law enforcement," *Rendon,* 607 F.3d at 989, and only normal law enforcement interests are involved here.

29 Subsequent to briefing and argument in this case, the Maryland Court of Appeals upheld an as-applied constitutional challenge to a portion of the Maryland DNA Collection Act (enacted several years after the events in the case at bar) that authorizes the warrantless collection and uploading of certain arrestees' DNA into the Maryland DNA database. *See King v. State,* 425 Md. 550, 42 A.3d 549 (2012). (The mandate in *King,* however, has been stayed pending the Supreme Court's ruling on the state's petition for certiorari. *See, Maryland v. King,* ——U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2012 WL 3064878 (July 30, 2012)). The *King* court, as we have, utilized a "totality of the circumstances" test to determine whether the search at issue was reasonable.

> We note, however, that the ultimate conclusion of the *King* Court does not alter our analysis. First, the case is factually distinguishable. Not only did it involve a portion of Maryland's DNA statute not in effect at the time of events in the case at bar, but it involved the taking of a DNA swab from an arrestee, rather than the creation of a DNA profile from a victim's DNA sample already lawfully in police possession. Second—and significantly—the *King* Court did not address at all the application of the good faith exception, nor is there any indication in the opinion that it was asked to do so.
>
> Since the question is not before us, we express no opinion on the *King* Court's conclusion, although we note that it is contrary to decisions by the Third and Ninth Circuits. *See, e.g., supra* at 245–46, 249–50 (citing *Haskell v. Harris,* 669 F.3d 1049, 1062 (9th Cir.2012), *reh'g en banc granted,* 686 F.3d 1121 (2012) and *United States v. Mitchell,* 652 F.3d 387, 407 (3d Cir.2011) (en banc), both of which upheld statutes requiring the collection of DNA from arrestees).

30 *See, e.g., Wallace,* 816 A.2d at 896–97 (collecting cases); *Williams v. Commonwealth,* 259 Va. 377, 527 S.E.2d 131, 136 (2000) (holding that defendant had no expectation of privacy in boots that were seized incident to his arrest and thus that "later examination of the property by another law enforcement official [with a different department] does not violate the Fourth Amendment", even if being examined for a different charge than the charge for which he was arrested); *United States v. Turner,* 28 F.3d 981, 983 (9th Cir.1994) (removal of defendant's cap from jail by postal inspector without a warrant was proper since it remained in the possession of the police); *United States v. Thompson,* 837 F.2d 673, 674 (5th Cir.1988) ("A person lawfully arrested has no reasonable expectation of privacy with respect to property properly taken from his person for inventory by the police. Later examination of that property by another law-enforcement officer is, therefore, not an unreasonable search within the meaning of the Fourth Amendment."); *United States v. Johnson,* 820 F.2d 1065, 1072 (9th Cir.1987) (money seized by state authorities upon defendant's arrest for driving under the influence could be later reviewed by a federal agent to obtain serial numbers in a robbery investigation without a warrant); *United States v. Jenkins,* 496 F.2d 57 (2d Cir.1974) (relying on *Edwards* to conclude there was no Fourth Amendment violation where a federal agent took "second look" and seized without a warrant money that had been taken from the defendant following his arrest on unrelated state charges and maintained in the jail safe).

31 Counsel prefaced her comments by referencing the policy at the time Davis' profile was uploaded. The record does not disclose whether that policy has changed in light of subsequent developments in the Maryland or federal DNA laws, or as a result of decisions like the district court's decision in the instant case, issued in 2009.

32 Because those are not the facts before us, we need not resolve the constitutionality of the DNA searches in those hypothetical cases. But those slight differences in fact might well alter our conclusions regarding the constitutionality of

the police actions and the uploading of DNA profiles. Thus, the mere existence of the policy stated by counsel does not necessarily mean that the violation here was anything other than isolated.

33 While the analyst testified that she knew the state level database required deletion of a profile once a court had exonerated a person previously convicted, there is nothing in the record to support that she knew the profile of either a victim or a suspect was required to be destroyed in the circumstances here, nor has Davis pointed to any statute with such a requirement.

34 Contrary to the dissent's contention, we are not creating a "new, freestanding exception" to the exclusionary rule. *Post* at 278. Rather, we have faithfully applied the Supreme Court's precedent, including its recent application of *Leon* in *Herring* and *Davis.* While the dissent refers to the "narrow holding[s]" in those cases, and deems inapplicable the "broad cost-benefit analysis" that underlies those holdings, *post* at 278, 280, the Supreme Court's analysis in those cases is not dicta, but is the rationale supporting the Court's application of the good-faith exclusion.

1 The majority "assume[s], without deciding, that there was a separate Fourth Amendment violation in retaining Davis' DNA profile in the local CODIS database." Maj. Op. at 233. While it is not critical to my analysis in this case, I would likely hold that under circumstances such as those presented here, the state action involved in (1) extracting Davis's DNA from the biological material recovered from his clothing, (2) chemically analyzing that material to create a DNA profile, and (3) uploading the profile into the local DNA database essentially constitutes a single continuous course of constitutionally implicated endeavors subject to Fourth Amendment scrutiny. Governments undertake to engage in this full course of conduct inasmuch as the purpose of this extraordinary forensic science is to enable law enforcement to identify persons, and that cannot be achieved through less than the full protocol we have come to know. For present purposes, however, I join in the majority's assumption.

2 I would not reach the question whether the district court properly excluded the testimony of Dr. Jeffrey Neuschatz, Davis's proposed expert on eyewitness identifications. The district court excluded Dr. Neuschatz's testimony in significant part because it had previously decided to admit the DNA evidence, which meant that "the significance of eyewitness identification" in the case was "[not] high." J.A. 2323. Because I would reverse the district court's denial of Davis's motion to suppress the DNA evidence, that premise of the district court's decision would no longer apply, and in a retrial without that evidence the court might very well come to a different conclusion. Thus, I find it unnecessary to address the district court's grant of the government's motion to exclude Dr. Neuschatz's testimony.

3 Although the majority, following the lead of the parties, purports to identify *three* alleged Fourth Amendment violations, as I explain within, a proper analysis of this case must distinguish as separate constitutionally cognizable invasions: (1) the seizure of the bag at the hospital followed by (2) the search of the bag. Indeed, as the majority's own analysis shows, *see* Maj. Op. at 235 ("As to both the seizure of the bag and the subsequent search of the bag, the district court's reliance on *United States v. Williams,* 41 F.3d 192 (4th Cir.1994) was appropriate."), the seizure and search of the bag are indeed distinct undertakings. Moreover, although Davis combined these two challenges in some ways, there is no question that he has challenged each distinct invasion of his rights. *See* Appellant's Br. at 17 ("First, the police illegally seized and searched the white bag containing Mr. Davis' clothes beneath his hospital bed when he came in as a shooting victim four years prior to the Schwindler robbery and shooting.").

4 Unlike the majority, it is difficult if not impossible for me to imagine that a person, even a hospital patient undergoing treatment in an emergency room as was Davis, lacks a reasonable expectation of privacy in his underwear which is concealed by hospital personnel in a bag and left within easy reach of the patient.

5 The very case relied on by the majority for its expansive application of the "lawful access" element of the plain view doctrine in response to this dissent makes clear that the typical plain view seizure case involves concern for protection of a citizen's spatial privacy, e.g., the lawfulness of an entry, not with the distinct constitutional question of whether a seizure of a constitutionally protected "effect" from the personal possession of its owner is "lawful." *See* Maj. Op. at 234 (contending that the "lawful right of access" requirement "is meant to guard against warrantless entry onto premises whenever contraband is viewed from off the premises in the absence of exigent circumstances"; thus, while "lawfully positioned" "refers to where the officer stands when she sees the item," "lawful right of access" refers "to where she must be to retrieve the item") (quoting *Boone v. Spurgess,* 385 F.3d 923, 928 (6th Cir.2004) (holding that disputed issue of fact precluded summary judgment for officers in plaintiff's Fourth Amendment claim under 42 U.S.C. § 1983 where plaintiff

disputed officers' assertion that they could see handgun in his car while they were standing outside the vehicle, and thus permissibly entered vehicle to retrieve the firearm and then arrested plaintiff)).

Nor does the majority's invocation of *Washington v. Chrisman,* 455 U.S. 1, 102 S.Ct. 812, 70 L.Ed.2d 778 (1982), *see* Maj. Op. at 234, aid its cause. In that case, "the officer noticed seeds and a small pipe lying on a desk 8 to 10 feet from where he was standing [in the threshold of defendant's college dormitory room after having detained the defendant's roommate for underage possession of an alcoholic beverage]. From his training and experience, the officer believed the seeds were marihuana and the pipe was of a type used to smoke marihuana. He entered the room and examined the pipe and seeds, confirming that the seeds were marihuana and observing that the pipe smelled of marihuana." 455 U.S. at 4, 102 S.Ct. 812. Chrisman's expectation of privacy *in his room* gave way to the officer's duty to keep in close contact with the roommate, whom the officer had allowed to reenter the room to retrieve his identification, and who had actually consented to the officer's presence. *Id.* at 3, 102 S.Ct. 812. In short, *Chrisman* has nothing whatsoever to do with plain view seizures of, or "lawful access" to the contents of, *containers.*

6 Imagine, for instance, that a murder suspect's father is sitting in a fast food restaurant eating a salad and reading the morning paper. A homicide detective working the case has been told by a reliable informant that the suspect has admitted to the informant that he, the suspect, had written a full confession and mailed it to his father and that his father keeps the letter with him at all times in a distinctive black briefcase that his father carries wherever he goes. The black briefcase described by the informant is resting on the floor of the fast food restaurant at the feet of the father when the detective enters the restaurant. The detective seizes the briefcase and, without consent or a warrant, immediately opens it. He observes instantly the letter and, quite unexpectedly, wads of counterfeit U.S. currency. The letter is used by the state to prosecute the son for homicide and the possession of counterfeit currency charge is prosecuted in federal court against the father.

Does the majority truly believe that the detective, having what the majority would call "lawful access" to the briefcase, and with probable cause to believe that evidence of a murder would be found in the briefcase, i.e., it was "immediately apparent" (based on the highly reliable information possessed by the detective) that the container held evidence of a criminal offense, could seize the briefcase and search it on the basis of the plain view seizure exception?

Of course not.

Arguably, the briefcase could be seized on the basis of exigency, *see United States v. Chadwick,* 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), *abrogated on other grounds by California v. Acevedo,* 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991), but surely even the majority would agree that a warrant would be required to search the briefcase. Even apart from a nice question of the son's standing to challenge the search of the father's briefcase, there clearly is no standing issue as to the father, and the plain view exception simply could not justify the search of the briefcase, despite the "virtual certainty" that evidence of a criminal offense was contained therein. So it is here.

7 In my view, the nonconsensual, warrantless seizure of the bag in this case could only be justified by exigent circumstances, rather than by the plain view seizure doctrine. It appears, however, that the government did not press such an argument before the district court, and with good reason. Although the notion that police need clothes with bullet holes in them to help prove someone got shot is beyond fanciful, there is some support for the view that Detective King had probable cause to believe that the bag beneath Davis's bed contained evidence of his shooting. *But see infra* at 271–73 (explaining why the officers' interaction with Davis demonstrated conclusively that they did not believe his story and, accordingly, they lacked probable cause to believe he had been the victim of a felonious shooting). Therefore, particularly given Detective King's testimony that Davis was uncooperative in response to questioning about the crime, King could reasonably have feared that the clothing would disappear due to a deliberate act of Davis or an inadvertent act of hospital personnel. On the other hand, a police officer might have been posted to safeguard the clothing until a warrant was obtained. Regardless, the government does not raise this argument and, as discussed *infra,* the subsequent search of the bag was unconstitutional in any event.

Indeed, as both the majority and district court opinions demonstrate, application of an exigency exception to the warrant requirement would not save the subsequent search of the bag in this case because no conceivable exigency would apply once the bag was in the custody of law enforcement.

8 It is evident that the police removed Davis's clothing from the bag at some point, but the record does not indicate when the police first opened the bag, so it is not clear when the warrantless container search actually occurred. Lieutenant Lampe testified that the clothing was still in the bag when he arrived at the hospital and retrieved it from Detective King. He recalled that the bag was plastic, but could not recall what it looked like, and he stated that he did not inspect the clothes right away.

> To the extent the majority laments the officers' failure of memory about what the bag looked like and what precisely they did many years before they were called to testify on behalf of the government in this case, *see* Maj. Op. 236 n. 15, the majority has done little more than highlight still *another* reason for the imperative of the warrant—issuing function of the state and federal courts. Had the officers properly conducted themselves in searching the bag on the authority of a judicial warrant, there would be no basis for the majority's lament. "Ever since 1878 when Mr. Justice Field's opinion for the Court in *Ex parte Jackson,* 96 U.S. 727, 24 L.Ed. 877 (1877), established that sealed packages in the mail cannot be opened without a warrant, it has been settled that an officer's authority to possess a package is distinct from his authority to examine its contents." *Walter v. United States,* 447 U.S. 649, 654, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980) (plurality opinion) (citing *Arkansas v. Sanders,* 442 U.S. 753, 758, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), and *United States v. Chadwick,* 433 U.S. 1, 10, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977)).

9 The majority's conclusory assertion that, "[T]he subsequent search of the bag (whether to identify or examine its contents), was warranted if it was a foregone conclusion that the bag contained the clothing, which was evidence of a crime," Maj. Op. at 235, is confounding. As explained below, King could only have opened the bag and inspected its contents if their incriminating nature was so obvious that no "search" occurred—but the majority agrees that a search did occur. Of course, having chosen to ignore entirely this dissent's reliance on *Chadwick, Robbins*, and *Sanders,* the majority's sole escape is to stand silent in the face of clearly applicable Supreme Court precedents which cannot rationally be distinguished. Those cases, among others, make clear that whether a search occurs is not simply a matter of "labeling." *Cf.* Maj. Op. at 232–33 n. 11.

10 "As *Robbins v. California* ... has established, it takes an open package, or one whose configuration is distinctive as to its contents (i.e., a kit of burglary tools or a gun case) to bring into play the plain view exception to the generally unyielding rule that a warrant must first be obtained." *Blair v. United States,* 665 F.2d 500, 513 (4th Cir.1981) (Murnaghan, J., dissenting); *see id.* at 510 (Murnaghan, J., dissenting) ("It is elementary that probable cause alone does not permit a search. It only provides a substantiating basis for issuance of a warrant.").

11 To the extent *Sanders* and the *Robbins* plurality required that officers who have probable cause that a vehicle contained evidence of crime must obtain a warrant to search closed containers in the vehicle, those cases were overruled. *See United States v. Ross,* 456 U.S. 798, 825, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982); *California v. Acevedo,* 500 U.S. 565, 580, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991). The discussions in *Sanders* and *Robbins* of when the contents of a closed, opaque container are nonetheless obvious, however, remain accurate and unaltered. *See Williams,* 41 F.3d at 196.

12 The majority suggests, utterly without support in the record, that Detective King's testimony that he observed "a bag underneath of the hospital bed that contained clothing," Maj. Op. at 235–36 (citing J.A. 140), "fairly supports an inference that Officer King could see the clothing through the bag or that the bag was partially open, revealing clothing," *id.* at 236. The majority's reasoning is clearly flawed; Detective King's conclusory statement reflecting his own personal belief that the bag contained clothing does nothing to confirm that the belief was anything but an unfounded assumption. For instance, if an employee of a McDonald's restaurant stated that a happy meal contained French fries, we could not reasonably infer that the employee had looked into the box. Instead, it is most likely that the employee merely assumed that the customer had chosen that classic side item, when the customer may well have thought better and opted for apple slices instead.

> Contrary to the majority's speculation that Detective King seized the clothing because he could actually see it in or through the bag, the government concedes in its brief that Detective King's nonconsensual, warrantless seizure of Davis's personal property was simply King's standard operating procedure. *See* Govt's Br. at 19 ("As was his practice in previous shooting investigations, Detective King secured the victim's clothing, which had been removed by hospital staff to treat the injury...."). The district court's analysis on this point could not be clearer: "There was no testimony as to whether the bag was open or closed, or whether it was transparent, opaque, or somewhere in-between." *Davis,*

657 F.Supp.2d at 638. The majority is not entitled to enhance this negative finding so that it becomes the basis for an inference favorable to the government.

Thus, the majority's extraordinary appellate factfinding ignores the undisputed applicability of the rule that in this case the government bore the burden of proof to establish all the facts necessary to the existence of whatever warrant exception might save the search and seizure in this case, *see supra* pp. 261–63. The majority indulges a so-called "inference" never propounded by the government or drawn by the district court, and not supported by any finding of the district court, in favor of the government. *See, e.g.,* Maj. Op. at 236 ("Nothing in the record contradicts such a conclusion."). Davis had no burden to disprove anything regarding the lawfulness of the search of the bag. Any absence of evidence on the point should count against the party with the burden of proof, here the government.

13 The constitutionality of this corollary to the plain view seizure doctrine is widely accepted, but there seems to be a circuit split with respect to whether the "foregone conclusion" analysis incorporates extrinsic evidence and/or an officer's specialized knowledge. In *Williams* we considered relevant that the officer had years of experience in narcotics investigations. 41 F.3d at 198. Other circuits have instead analyzed the question from the objective viewpoint of a reasonable layperson. *See, e.g., United States v. Gust,* 405 F.3d 797, 803 (9th Cir.2005) ("[C]ourts should assess the nature of a container primarily with reference to general social norms rather than solely by the experience and expertise of law enforcement officers.") (internal quotation marks and alteration omitted); *United States v. Meada,* 408 F.3d 14, 23 (1st Cir.2005) (holding that the defendant had no reasonable expectation of privacy in the contents of a container that was labeled "GUN GUARD" and thus was "readily identifiable as a gun case"); *United States v. Villarreal,* 963 F.2d 770, 775–76 (5th Cir.1992) (holding that even though fifty-five gallon drums were labeled "phosphoric acid," their contents could not necessarily be "inferred"; "The fact that the exterior of a container purports to reveal some information about its contents does not necessarily mean that its owner has no reasonable expectation that those contents will remain free from inspection by others."); *United States v. Bonitz,* 826 F.2d 954, 956 (10th Cir.1987) ("This hard plastic case did not reveal its contents to the trial court even though it could perhaps have been identified as a gun case by a firearms expert."). I believe the latter view is the proper one, because it is consistent with the underlying rationale that a person does not maintain a reasonable expectation of privacy in contents of a container that are essentially open to view.

14 As noted above, a determination whether "historical facts satisfy a constitutional standard" is reviewed de novo. *Gwinn,* 219 F.3d at 331. The question whether the information available to Detective King rendered the incriminating nature of the contents a "foregone conclusion" is such a determination, as the historical facts surrounding the seizure of the bag are not in dispute.

15 We described this turn of events as follows in our opinion reversing the district court's grant of Jamison's motion to suppress evidence for violation of the *Miranda* doctrine:

> Without securing Jamison's consent, Detective Macer examined Jamison's injury, partially exposing his genitalia. He found charring and stippling at the entry wound consistent with a shot fired at close range. He further observed a downward trajectory from the entry wound to the exit wound. Finding these facts to be in tension with Jamison's account of the shooting, Detective Macer then examined Jamison's clothing and found no bullet holes. Detective Macer again asked Jamison to explain the shooting; Jamison repeated that he was shot while using drugs. When Detective Macer explained that his observations seemed inconsistent with Jamison's story, Jamison admitted that he shot himself with a handgun and threw the gun away. Detective Macer asked Jamison to reveal the location of the gun so that it could be secured, but Jamison refused, explaining that he was on probation.

Jamison, 509 F.3d at 626–27 (footnote omitted).

16 A unanimous Supreme Court of Georgia recently reached the same conclusion on material facts nearly identical to those here in an interlocutory appeal in a capital case. In *Clay v. State,* 290 Ga. 822, 725 S.E.2d 260 (2012), an officer had seized a bag containing a murder suspect's bloody clothing while the suspect (who, unlike Davis, was unconscious at the time of the seizure) was undergoing treatment at a hospital. 725 S.E.2d at 264, 269. The court found that the officers were not justified in opening the bag because "all that was in plain view when Officer Cupp seized the bagged clothing from the counter was the pink and white personal effects bag itself." *Id.* at 269. "[W]ithout opening the bag, it was not

a 'foregone conclusion' that the bag contained [the suspect's] bloody clothes," and so the "full-blown search of the bag" constituted an unlawful search. *Id.*

> Concomitantly, Davis cites to us, as he cited to the district court, a raft of cases supporting the unremarkable proposition, largely accepted by the district court but ignored by the majority, that a hospital patient retains his constitutionally protected interests in his clothing removed by hospital personnel in the course of their rendering treatment to him. *See* Appellant's Br. at 23–24 (citing *Jones v. State,* 648 So.2d 669 (Fla.1994)); *People v. Jordan,* 187 Mich.App. 582, 468 N.W.2d 294, 301 (1991); *Commonwealth v. Silo,* 480 Pa. 15, 389 A.2d 62, 63–67 (1978); *People v. Watt,* 118 Misc.2d 930, 462 N.Y.S.2d 389, 391–92 (N.Y.Sup.Ct.1983); *Morris v. Commonwealth,* 208 Va. 331, 157 S.E.2d 191, 194 (1967); *People v. Hayes,* 154 Misc.2d 429, 430–34, 584 N.Y.S.2d 1001 (N.Y.Sup.Ct.1992); *State v. Lopez,* 197 W.Va. 556, 476 S.E.2d 227, 231–34 (W.V.1996). Not a single one of these courts accepted the deeply flawed conception of the plain view doctrine applied by the district court in this case and accepted here by the majority.

17 None of the cases cited by the government in support of its reconceptualization of the plain view seizure doctrine are to the contrary. *See United States v. Jackson,* 381 F.3d 984 (10th Cir.2004) (after officer searched baby powder container with defendant's consent and discovered cocaine secreted inside, officer could replace lid to container, arrest defendant, and then reopen the container at the police station without obtaining a warrant); *United States v. Eschweiler,* 745 F.2d 435, 439 (7th Cir.1984) (during search of premises, key to safety deposit box discovered in an envelope marked "safety deposit box"); *United States v. Morgan,* 744 F.2d 1215, 1222 (6th Cir.1984) (after airline employee opened suspicious package and discovered container marked with names of controlled substances used to dilute illegal narcotics, and then without a request by drug agents, reopened suitcase when drug agents arrived, chemicals were in "plain view" of agents and marked containers could be opened without a warrant).

18 Of course, I do not seek a return to the "mere evidence" doctrine discarded by the Supreme Court in *Warden v. Hayden,* 387 U.S. 294, 301–02, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967). Rather, the point here is that my search of Supreme Court and circuit authority, as I discuss in the text, does not reveal an instance in which a law enforcement officer has been authorized to seize a closed, opaque container containing non-contraband personalty from the possession of a person on the basis of the plain view exception. In such circumstances, even assuming a seizure is allowed, absent some applicable warrant exception, if the ensuing search of the container was without a warrant, the search violates the Fourth Amendment. Ample Supreme Court authority supports this view. *See supra* pp. 263–66.

19 In contrast, one never has a reasonable expectation of privacy in regard to his possession of contraband. *See United States v. Moore,* 562 F.2d 106, 111 (1st Cir.1977) (observing that "the possessors of [contraband and stolen property] have no legitimate expectation of privacy in substances which they have no right to possess at all"), *cert. denied,* 435 U.S. 926, 98 S.Ct. 1493, 55 L.Ed.2d 521 (1978); *cf. Jacobsen,* 466 U.S. at 123, 104 S.Ct. 1652 ("A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy."). *Jacobsen* and the cases relied on by the majority, *see* Maj. Op. at 237–38, are entirely consistent with this longstanding rule. *See, e.g., United States v. Smith,* 459 F.3d 1276, 1293 (11th Cir.2006) (plain view seizure of child pornography in the course of a search for narcotics); *United States v. Rodriguez,* 601 F.3d 402, 408 (5th Cir.2010) (where officers came upon a sawed-off shotgun in the course of responding to a domestic violence call, the court reasoned that, "The shotgun was properly seized on a temporary basis to secure it so that the officers could investigate the domestic disturbance call. Once seized for this purpose, the incriminating nature of the weapon became apparent and it was then subject to permanent seizure as contraband.").

20 In fairness to my well-meaning colleagues in the majority, they are not the first judges to misapply the plain view seizure doctrine. *See, e.g., Boone v. Spurgess,* 385 F.3d 923, 928 (6th Cir.2004) (discussed *supra* n. 5.) For example, in jurisdictions such as Maryland, where transporting an unsecured handgun in a vehicle is generally prohibited, if during a traffic stop an officer observed from outside the vehicle the barrel of a handgun, it is not the plain view seizure doctrine that authorizes the officer to enter the vehicle to seize the weapon. Rather, now with probable cause to arrest all the occupants, *see Maryland v. Pringle,* 540 U.S. 366, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003), and with probable cause to believe that the vehicle contains evidence of a criminal offense, the officer can search the vehicle and seize the firearm under either the search incident to arrest exception or the automobile exception to the warrant requirement. *See id.* The officer's view of the firearm was certainly "plain" in the "Merriam Webster" sense, but there is no occasion for proper

application of the plain view seizure doctrine. Whether such cases come to the court by virtue of governmental theorizing or otherwise I cannot say, but we should guard against, rather than embrace, such distortions of doctrine.

21 We and other circuits have recognized what is surely obvious: the *Leon* good-faith exception does not salvage evidence seized on the authority of a tainted search warrant, i.e., one in which probable cause is based on the fruits of a prior illegal search, as in this case. *See United States v. Mowatt,* 513 F.3d 395, 405 (4th Cir.2008) (good-faith exception does not apply where search warrant was prompted by previous warrantless illegal search), *abrogated on other grounds, Kentucky v. King,* —— U.S. ——, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011); *United States v. McGough,* 412 F.3d 1232, 1240 (11th Cir.2005); *United States v. Reilly,* 76 F.3d 1271, 1280 (2d Cir.1996); *United States v. Scales,* 903 F.2d 765, 768 (10th Cir.1990); *United States v. Wanless,* 882 F.2d 1459, 1466 (9th Cir.1989).

22 As we explained in *Jones,*

> "the exclusionary rule is our sole means of ensuring that police refrain from engaging in the unwarranted harassment or unlawful seizure of anyone," regardless of where that person resides or visits. *United States v. Foster,* 634 F.3d 243, 249 (4th Cir.2011). Accordingly, we find the exclusion of evidence to be the proper remedy in this case because of the "the potential ... to deter wrongful police conduct." *See Herring v. United States,* 555 U.S. 135, 137, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009).

678 F.3d at 305, n. 7.

23 I respect my good colleagues' discomfort with a reversal in this case, a discomfort that is shared by all members of this panel. *Cf. Blair,* 665 F.2d at 509 (Murnaghan, J., dissenting) ("Whenever the exclusionary rule applies, with the resulting suppression of trenchant evidence of guilt, and the substantial and regrettable consequence that an offender against society may go free, the judge is apt to wince or at least to feel a twinge."). Nevertheless, without clearer, more definitive instructions from the Supreme Court than those relied on by the majority, "We should not avoid or vitiate the effectiveness of the exclusionary rule by distorting what constitutes the essential ingredients of a proper search or seizure." *Id.*

24 *See* Adam Liptak, Supreme Court Edging Closer to Repeal of Evidence Ruling, N.Y. Times, Jan. 31, 2009, at Al.

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474 F.2d 1071
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Appellee,
v.
Edward J. FISCH, Ivan
L. Glasscock, Appellants.

Nos. 72-2007, 72-2068.
|
Feb. 16, 1973.
|
Certiorari Denied May 29, 1973.

See 93 S.Ct. 2742.

Synopsis

By judgments of the United States District Court for the Southern District of California, the defendants were convicted of various violations of federal narcotics laws and with conspiracy and they appealed. The Court of Appeals held, inter alia, that conversations of defendants in motel room overheard by officers in adjoining room without use of any electronic equipment, were not subject to suppression on ground that there was a violation of privacy in view of the nontrespassory origin of information received, absence of artificial means of probing, gravity of the offense involved and fact that there was reasonable cause for police to believe that the room in question was being used in the aid of a criminal venture.

Affirmed.

Attorneys and Law Firms

***1072** Edward V. Brennan (argued), of Ferris, Weatherford & Brennan, San Diego, Cal., Philip A. DeMassa (argued), San Diego, Cal., for appellants.

Thomas M. Coffin, Asst. U. S. Atty. (argued), Stephen G. Nelson, Asst. U. S. Atty., Harry D. Steward, U. S. Atty., San Diego, Cal., for appellee.

***1073** Before TRASK and CHOY, Circuit Judges, and TALBOT SMITH,[*] District Judge.

Opinion

PER CURIAM:

The case before us involves eavesdropping, not by the use of electronics or artificial means, but in the traditional "listening at the keyhole" sense. The convicted defendants were in a motel room and the agents listened from an adjoining room as the operation was discussed. The principal argument of appellants is that their right of privacy was thus invaded.

The appellants were charged in a four count indictment with, count one, conspiring to import, count two, importing, count three, conspiring to possess with the intention of distributing, and count four, possessing with the intention of distributing approximately 70 pounds of marijuana, in violation of 21 U.S.C. §§ 841(a)(1), 846, 952, 960 and 963. After trial to the Court, appellant Fisch was found guilty on all four counts, and appellant Glasscock on counts one, two and three, but not guilty on count four. The case below is reported sub nom. United States v. Perry, 339 F.Supp. 209 (S.D. Cal., 1972).

The *modus operandi* was somewhat unusual. The marijuana was dropped from an airplane onto an area west of Vulcan Mountain, near the Santa Ysabel Indian Reservation. The drop area was marked by flares. These flares were observed by a retired California Division of Forestry ranger, Mr. Tobin, who stopped to investigate. As he approached, he observed two cars nearby, and two men. One asked if he was from the garage. He answered that he was not and inquired as to their "problem." He was told they had a flat tire and trouble underneath the car. Unable to observe any flat, he took the license numbers of the cars, obtained the names of the men, Glasscock (appellant herein) and Thorpe, and suggested that they might obtain mechanical assistance at the Santa Ysabel Standard station. After telling them to extinguish the flares, he left the area. On the following day, September 24, this information was given to Deputy Sheriff Gene Cowley, of the San Diego County Sheriff's Office. At the same time Deputy Cowley received another report. This, from Wayne and Larry King, residents of the Santa Ysabel Indian Reservation, was delivered by one of the Santa Ysabel Mission Tribe, Anthony Taylor. The message was that a red and white airplane had been observed circling in the area of Vulcan Mountain and that it had dropped two objects during one of its passes. This had occurred at about the same time that Tobin had encountered the burning flares.

In patrolling the area of the aircraft drop immediately thereafter, Cowley observed the same Ford van previously

described to him by Tobin travelling very slowly down the highway. The back end of the van was dirty and the license could not be read. A tail light was defective. Cowley stopped the van and asked the occupants (Glasscock and Thorpe) to produce identification. Indiana driver's licenses were produced, as well as a California registration, Glasscock stating that they had borrowed the van from a Sacramento friend, James Nash. As Cowley was running a name check on the occupants, he asked permission to check the van further, which was given by Glasscock, the driver. Under the right front seat Cowley observed an aerial navigation map. It was opened to expose the Julian Omni station on Vulcan Mountain, and on it a line had been drawn from the Vulcan site northwest, intersecting Highway 79 at the point of the suspected air drop, near where the van had been observed by Ranger Tobin on the previous evening. Upon the completion of the name check the van was released.

Later that day Cowley was informed that Larry and Wayne King, who had ***1074** observed the plane circling the day before, making the drop, had found a duffle bag containing 13 kilos of marijuana on top of Vulcan Mountain. This bag had been turned over to Border Patrol Agents in the area. Two days later a second duffle bag was found by the tribesman, Anthony Taylor. A few minutes after making the find Taylor encountered three unidentified males who told him they were there for fishing. He told them they were trespassing on Indian land and the bag was delivered to Deputy Cowley.

Again, on September 28, 1971, Deputy Cowley observed the Ford van parked off the highway near the area of the drop. No one was observed nearby but the engine was warm. Upon resuming patrol, he later observed the van on the highway. The license plate was still dirty and the tail light still defective. Glasscock showed Cowley a receipt for work done on the van and he was merely warned, not cited, upon his promise to make the necessary repairs. It was ascertained at this time also that the men were staying at the Holiday Inn Motel, Mission Valley. This information had been requested by Cowley's superiors and was transmitted to them.

Deputy Sheriff Perkins was then assigned to the Holiday Inn, Mission Valley. He learned from the motel clerk that Glasscock and Thorpe were registered in Room 514. Perkins requested an adjoining room but none was available, so he registered in 508. Upon the Deputy's request, and upon being informed that a smuggling investigation was underway, the motel clerk moved Glasscock and Thorpe to room 506 (adjacent to 508), upon the excuse that others had prior reservations on their room.

Aural surveillance was then begun. An attempt was made to use a suction cup electronic device but it was defective and nothing intelligible could be heard from it so its use was abandoned. All relevant conversations were heard by the naked ears of the officers. Some of the conversation was so loud that it was heard by an agent sitting on the bed in the middle of the room, specifically in part, the questioning of Fisch, the pilot, by Glasscock as to his speed when he made the drop. Other parts were heard by listening prone at the door, lying some six or eight inches away from a crack between door and carpet, leaving "room for your notebook to take notes." There was talk of drug usage, of the "specific deal," the problems they had had, the "trouble finding the stuff in the area" and how "they had been hassled by the Sheriffs in the area, and the Indians and the Ranger." Glasscock indicated that the next time "they were going to do a little bit more research into the area." He also telephoned one "Don" for help in locating the marijuana, arrangements being made for three more men to assist in the search. In short, there was ample disclosure and admission of the criminal smuggling operation then and there under execution. Arrests of the occupants of Room 506 were made immediately after the telephone call to "Don," and of the three men upon their arrival.

Against this overwhelming array of evidence, the appellants assert to us, as defendant Fisch puts it, that there has been a "gross invasion of privacy," or in the words of appellant Glasscock, a "sad and shocking disregard for appellant's constitutional right of privacy." In addition, complaint is made of the stop and search of the Ford van on the morning of the 24th, and of the information and evidence obtained as a result of the second stop of the Ford van on September 28. We will consider the vehicle questions before proceeding to the privacy issue.

On the morning of September 24, it was obvious that activities of a highly suspicious nature were underway. By this time the passes of the circling airplane were known to Cowley, the drops from the plane, the flares burning in the field, and the presence of Glasscock and Thorpe, with their non-observable flat tire. Consequently, when Cowley, patrolling in the area of the observed drop, encountered the same van as had Tobin ***1075** the day before, proceeding very slowly down the highway with its license plate obscured and a defective tail light, he was under a duty to stop the car. The occupants were questioned, identities sought to be established, names were obtained and a "name check" was made. While waiting for the results of the check, permission was asked and, the trial court found, granted to "look inside and check your van."

The reason for the search was Cowley's reasonable unease about the situation presented. "The registered owner wasn't either occupant," he stated. "They were from Indiana. The van was registered in California, and they didn't have any written permission to have the vehicles, and I wanted to look further." The limited search made disclosed the aircraft navigation map marked as described above. When the "names came back checked all right" the men were released.

With respect to the stopping of the Ford van, the validity of the detentions and actions involved is governed by the State law, subject, of course, to constitutional standards. Wartson v. United States, 400 F.2d 25 (9th Cir. 1968), cert. denied 396 U.S. 892, 90 S.Ct. 184, 24 L.Ed.2d 166 (1969). The California Vehicle Code, § 2805, provides in part:

A member of the California Highway Patrol may inspect any vehicle . . . on a highway . . . for the purpose of locating stolen vehicles, investigating the title and registration of vehicles . . .[1]

Under the applicable state law, the validity of a temporary detention by a peace officer for investigation and questioning is summarized in the case of People v. Henze, 253 Cal.App.2d 986, 61 Cal.Rptr. 545 (1967). Required is a rational suspicion on the part of the officer that something out of the ordinary is taking place, that there is "some indication" to connect the person under suspicion with such activity, and, of course, that such activity is related to crime. The Federal constitutional standard is found in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The ultimate question for resolution in each instance is whether the action taken by the officer was appropriate, tested not by the hunch of the officer, seasoned though he may be, but by an objective standard, namely whether the facts available to the officer at the moment of the seizure (or search) would warrant a man of reasonable caution in the belief that the action taken was appropriate to the situation there presented.

Looking to both the State and the Federal standards, it is obvious that they have been amply met. Something unusual, suspicious indeed of criminal activity, was taking place in this area and Glasscock and Thorpe were involved in it. The stop and search of the Ford van was justifiable and lawful. All statements and evidence resulting from the detention were properly admissible.

We have discussed the above issues at some length in deference to the zeal of counsel. It should be observed, however, that we find nothing in the record that would warrant our reversal of the District Court's finding that Glasscock, in fact, consented to the limited search made.

We turn now to the second stop of the Ford van, that on September 28. By this time it was known that the packages dropped from the plane contained marijuana. Glasscock and Thorpe were still roaming around in the area with their fishing gear. Their vehicular defects were still uncorrected. Under the totality of the circumstances there was now probable cause for arrest. The most vigorous representation to us at this point is that the real reason for the stop was to obtain the local address of the suspects. Under these circumstances we are not disposed to weigh the motives of the officers, to categorize, as appellants would have us do, into principal ***1076** and secondary reasons for the stop, some of which are concededly good, others allegedly bad. There was in fact at this point reasonable grounds for further inquiry, questioning as to continued presence in the area, residence therein, reasons for not bringing the vehicle into compliance with the law, and other relevant and pertinent inquiries. There was nothing arbitrary, capricious, or unlawful in the officer's actions at this point. The holding in Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966), is peculiarly applicable at this point:

We take it as settled that there is nothing ipso facto unconstitutional in the brief detention of citizens under circumstances not justifying an arrest, for purposes of limited inquiry in the course of routine police investigations. Rios v. United States, 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688 (1960); Busby v. United States, 296 F.2d 328 (9th Cir. 1961). A line between reasonable detention for routine investigation and detention which could be characterized as capricious and arbitrary cannot neatly be drawn. But due regard for the practical necessities of effective law enforcement requires that the validity of brief, informal detention be recognized whenever it appears from the totality of the circumstances that the detaining officers could have had reasonable grounds for their action. A founded suspicion is all that is necessary, some basis from which the court can determine that the detention was not arbitrary or harassing [361 F.2d at 415].

It is our conclusion, also, with respect to the second stop of the Ford van, that it was lawful and that all statements and any evidence obtained therefrom are admissible.

Coming now to privacy, there are several things this case is not, and it would be well to note them at this point. We have no telephone tap here. We have no bugging by electronic means. We have no trespass. The officers were

exercising their investigative duties in a place where they had a right to be and they were relying upon their naked ears. So using their natural senses, they heard discussion of criminal acts. What was heard, however, was expressed by speakers who insist that they were justifiably relying upon their right of privacy, who sought to keep their conversation private, who "did not expect that law enforcement officers would be located just a few inches away from the crack below the door connecting the two adjoining rooms," and who thus conclude that "If one justifiably relies on his privacy any eavesdropping constitutes a search and seizure within the meaning of the Fourth Amendment."

It is true, as appellants point out, that Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), holds that "The Fourth Amendment protects people not places,"[2] but this is not a rule of decision. Actually it is the Court's expression of the rationale of decision, that the property concepts so long governing, substantially, decision as to unreasonable search no longer control. In short, this particular phrase, which is cited to us again and again, expresses little more than a rejection of the trespass rule. It does not tell us what people are protected, when they are protected, or why they are protected.

But it is clear from *Katz* that for suppression of overheard speech the speaker must have "justifiably relied"[3] on his privacy. As the concurring opinion of Mr. Justice Harlan makes clear, the concept of justifiable reliance involves both subjective and objective aspects. There must, first of all, have been a reliance on, an actual and reasonable expectation of, privacy. But beyond the individual's expectations, the needs of society are involved. The individual's subjective, self-centered expectation of privacy is not enough. We live in an organized society and the individual's ***1077** expectation of privacy must be justifiable, "one that society is prepared to recognize as 'reasonable.'"[4]

The statements before us fail of suppression on both aspects. As Mr. Justice Harlan points out, concurring, "[S]tatements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited."[5] Here the conversations complained of were audible by the naked ear in the next room. True the listening ear was at the keyhole, so to speak, but another listening ear was also, at one time, on the bed in the middle of the room, where was heard the pilot's story. Appellants would have us divide the listening room into privileged or burdened areas, and the conversation into degrees of audibility to, we presume, the normal ear, thus a remark heard on the bed arguably admissible, but not those heard at the door, a loud remark admissible, arguably one uttered in "normal" tones, but definitely not one whispered. We find no precedent for a categorization involving such hair-splitting distinctions and we are not disposed to create one.[6]

Listening at the door to conversations in the next room is not a neighborly or nice thing to do. It is not genteel. But so conceding we do not forget that we are dealing here with the "competitive enterprise of ferreting out crime."[7] The accomplishment of the move of the defendants' room to one more accessible for surveillance violated no constitutional right of the appellants.[8] They could, had they wished, refused the transfer. The officers were in a room open to anyone who might care to rent. They were under no duty to warn the appellants to speak softly, to put them on notice that the officers were both watching and listening.[9] Their means of observation was not improper. In fact, they did not, with their naked ears, "intrude" upon the appellants at all. If intrusion there was it was, at times, the other way around, as anyone who has weathered the night in a motel room as the occupants next door partied and argued will bear ready witness.

The objection aspect of justifiable reliance, that the expectation be one recognized as reasonable by the current society,[10] bars the bizarre, the freakish, and the weird expectations. A recent perceptive study[11] poses the hypothetical of two narcotics peddlers who have chosen to rendezvous for an illegal transaction in a desolate corner of Central Park in the middle of the night and are surprised by a passing patrolman's haphazard illumination of their transaction. Their expectation of privacy was undoubtedly reasonable. Yet whether their expectation would be constitutionally enforced would depend upon the social considerations involved, or, in the words of Mr. Justice Harlan, whether "the expectation be one that society is prepared to recognize as 'reasonable.'"[12]

The test applied as to society's tolerance of the search rests, as it has for years, upon "the facts and circumstances–the total atmosphere of the ***1078** case."[13] There is no ready formula, "each case is to be decided upon its own facts and circumstances."[14] What we undertake, actually, is a balancing process, a weighing of the social factors involved. Or, as Judge Duniway put it in the pre-*Katz* case of Smayda v. United States, 352 F.2d 251 (9th Cir. 1965), cert. denied 382 U.S. 981, 86 S.Ct. 555, 15 L.Ed.2d 471 (1966), "The public interest in

its privacy, we think, must, to that extent, be subordinated to the public interest in law enforcement."[15]

Here, on the one hand, there is no doubt that society invests a hotel room, transient though its occupancy may be, with that special character of intimacy justifying its characterization as a private place. Stoner v. California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964); Lanza v. New York, 370 U.S. 139, 82 S.Ct. 1218, 8 L.Ed.2d 384 (1962), cited in United States v. Hitchcock, 467 F.2d 1107 (9th Cir. 1972). The "place," though its ownership or possession no longer controls, remains as an element for our consideration under the *Katz* ruling.[16] We consider, as well, the non-trespassory origin of the information received, the absence of artificial means of probing, with their potentialities for the wide-spread dissemination of total revelation,[17] the gravity of the offense involved,[18] here the smuggling of contraband. The type of information received from the aural surveillance is a factor to be considered in attempted delineation of the limits "of what society can accept given its interest in law enforcement," whether society can "reasonably be required to honor that expectation [of privacy] in all cases."[19] The degree of probable cause before us is high, there being reasonable cause for the police to believe that the room in question was being used in aid of a criminal venture.[20]

Upon balance, appraising the public and the private interests here involved, we are satisfied that the expectations of the defendants as to their privacy, even were such expectations to be considered reasonable despite their audible disclosures, must be subordinated to the public interest in law enforcement. In sum, there has been no justifiable reliance,[21] ***1079** the expectation of privacy not being "one that society is prepared to recognize as 'reasonable.'"[22]

Affirmed.

All Citations

474 F.2d 1071

Footnotes

* Honorable Talbot Smith, Senior District Judge, Eastern District of Michigan, Sitting by Designation.

1 This section of the Code has been held to apply to peace officers generally. People v. Brown, 4 Cal.App.3d 382, 84 Cal.Rptr. 390 (1970).

2 Katz v. United States, *supra*, at 351, 88 S.Ct. at 511.

3 *Id.*, at 353, 88 S.Ct. 507.

4 *Id.*, at 361, 88 S.Ct. at 516.

5 *Id.* See also, Ponce v. Craven, 409 F.2d 621 (9th Cir. 1969).

6 "[I]t would seem rather arbitrary to draw a constitutional line between the whisper and the shout." People v. Guerra, 21 Cal.App.3d 534, 98 Cal.Rptr. 627 (1971).

7 Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948).

8 "The enforcement of the criminal law is not, however, a mere sporting game, and the hunters, as well as the hunted, have their problems." United States v. Jones, 140 U.S.App.D.C. 70, 433 F.2d 1176 (1970), cert. denied 402 U.S. 950, 91 S.Ct. 1613, 29 L.Ed.2d 120 (1971).

9 Pope, J., concurring in Smayda v. United States, 352 F.2d 251 (9th Cir. 1965).

10 Sometimes phrased as "reasonable and legitimate expectation of privacy," United States v. Missler, 414 F.2d 1293 (4th Cir. 1969).

11 "From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection," 43 N.Y.Univ.L.R. 968 (1968).

12 389 U.S. at 361, 88 S.Ct. at 516.

13 United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950).

14 Go-Bart Importing Co. v. United States, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374 (1931).

15 See also Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), giving (in a search warrant situation) "full recognition to the competing public and private interests." See, also, State v. Smith, 37 N.J. 481, 181 A.2d 761, cert. denied 374 U.S. 835, 83 S.Ct. 1879, 10 L.Ed.2d 1055 (1963), quoted in People v. Berutko, 71 Cal.2d 84, 77 Cal.Rptr. 217, 453 P.2d 721 (1969), "But it is the duty of a policeman to investigate, and *we cannot say that in striking a balance between the rights of the individual and the needs of law enforcement, the Fourth Amendment itself draws the blinds* [to the window] *the occupant could have drawn but did not*" (Italics 77 Cal.Rptr. 222, 453 P.2d 726).

16 "As the Court's opinion states, 'the Fourth Amendment protects people not places.' The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a 'place.' " 389 U.S. at 361, 88 S.Ct. at 516, Harlan, J., concurring.

17 See Fried, "Privacy," 77 Yale L.J. 475 (1968).

18 Remington, "Criminal Justice Administration," 73, "Each of the methods which police may use in collecting evidence of crime has its own problems–problems of effectiveness, of intrusiveness, of interference with innocent people, of susceptibility to regulation. The seriousness of the criminal conduct may affect the degree to which people will tolerate intrusive detection techniques."

19 82 Harv.L.R. 63 (1968).

20 Cf., Smayda v. United States, *supra*.

21 Katz v. United States, *supra*, 389 U.S. at 353, 88 S.Ct. 507.

22 *Id.*, at 361, 88 S.Ct., at 516, Harlan, J., concurring.

129 F.3d 76
United States Court of Appeals,
Second Circuit.

UNITED STATES of America, Appellee,

v.

Shilon ROGERS, Defendant–Appellant.

No. 442, Docket 97–1111.
|
Argued Oct. 17, 1997.
|
Decided Oct. 28, 1997.

Synopsis

Defendant was convicted in the United States District Court for the Southern District of New York, Michael B. Mukasey, J., 1996 WL 422260, of possession of cocaine with intent to distribute. Defendant appealed. The Court of Appeals held that: (1) officer did not overstep *Terry* boundaries by opening rolled up paper bag after removing bag from defendant's pocket during permissible protective patdown search, and (2) defendant's offer to enter conditional guilty plea and her agreement to bench trial on stipulated facts did not come sufficiently early in proceedings to allow court or government to avoid burdens of litigating case, and thus defendant was not entitled to one-level adjustment to offense level for admission of guilt.

Affirmed.

Attorneys and Law Firms

***77** Philip L. Weinstein, New York City (Henriette D. Hoffman, The Legal Aid Society Federal Defender Division Appeals Bureau, of counsel), for Defendant–Appellant.

Gary Stein, Assistant United States Attorney, New York City (Mary Jo White, United States Attorney for the Southern District of New York, Craig A. Stewart, Assistant United States Attorney, on the brief), for Appellee.

Before: JACOBS and LEVAL, Circuit Judges, and RESTANI,[*] Judge.

Opinion

PER CURIAM:

Shilon Rogers appeals from a judgment of the United States District Court for the Southern District of New York (Mukasey, *J.*) convicting her of possession of cocaine with intent to distribute and sentencing her to 41 months of imprisonment. Rogers makes two arguments on appeal: (1) that the district court should have suppressed cocaine found in a rolled-up paper bag removed from her coat pocket, because the officer's opening of the bag was an unreasonable search; and (2) that the district court should have granted her an additional one-level downward adjustment for acceptance of responsibility under § 3E1.1(b) of the United States Sentencing Guidelines. We affirm.

***78 BACKGROUND**

On the afternoon of November 30, 1995, Sergeant William Mason and Officers John Quinn and Edward Schoales of the New York City Police Department's 26th Precinct were traveling north on 12th Avenue above 125th Street in an unmarked car. The driver of a southbound livery cab flashed his headlights several times and looked directly at Schoales as they passed. Mason deduced (correctly) that the driver was trying to get their attention and the police car made a U-turn, pulling up behind the livery cab as it stopped.

Schoales approached the cab and asked the driver to step out. The driver explained that he had been signaling because his passengers had changed their destination more than once and he feared he was being taken to a likely spot for a robbery. Schoales then told Mason about the change of destinations (a common feature of cab robberies) and about the driver's fear. Mason, believing that he was investigating a robbery in progress, asked the two passengers to get out of the car. Shilon Rogers was one of the passengers.

As Sergeant Mason spoke to Rogers on the sidewalk, he noticed that "she was being quite evasive" and was turning away as if to hide her left side. Rogers then reached with her left hand toward the lower part of her coat. Mason directed her to stand still, grabbed the coat where he thought she was reaching, and felt something he described as "a heavier object than what [he] expected to find." Mason then grabbed the coat with both his hands and felt "a hard object and then a softer object." Mason pressed and manipulated the coat and

its contents for a few seconds; he later testified that he was "fairly certain" it was drugs, but that he could not exclude the possibility that the pocket also contained a weapon. Mason summoned Schoales and instructed him to search Rogers' coat pocket. Schoales reached into the pocket, removed a rolled-up paper bag, opened it, and found inside a plastic bag containing cocaine. Rogers was then arrested.

Rogers moved to suppress the cocaine, arguing that the police had neither reasonable suspicion to justify the stop, nor probable cause to remove the paper bag from her pocket and open it without a warrant. In a thorough and well-reasoned opinion, the district court denied the motion on the ground that the stop-and-frisk was justified under the standard of *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and on the ground that the removal and opening of the paper bag were justified for two independent reasons: (1) it was reasonable for Schoales to remove and open the bag because Mason had been unable to exclude the possibility that it contained a weapon, and (2) what Mason could feel in his (lawful) touching of Rogers' pocket, together with the surrounding circumstances, established probable cause to believe that the pocket contained contraband. *See United States v. Rogers,* No. 95–CR–1136, 1996 WL 422260 at *4–7 (S.D.N.Y. July 29, 1996).

Shortly thereafter, Rogers proposed—and the government rejected—a conditional guilty plea that would have preserved her right to appeal the district court's denial of her motion to suppress. Rogers chose to stand trial and waived her right to a jury. After a brief bench trial, at which Rogers' counsel waived opening and closing arguments and stipulated to the several facts of the case, the district court found Rogers guilty as charged.

At the sentencing hearing, Rogers argued for a three-point reduction in her offense level for acceptance of responsibility under U.S.S.G. § 3E1.1. The district court was initially reluctant to grant the reduction, questioning whether a defendant who preserves the right to appeal by agreeing to a bench trial on stipulated facts is entitled to a reduction for acceptance of responsibility. As the court observed, the preservation of the right to appeal manifested a desire to avoid responsibility, not to accept it. Ultimately, the district court granted a two-point reduction for acceptance of responsibility under § 3E1.1(a) by reason of Rogers' providing information about others involved in the distribution of drugs, but denied the requested third point under § 3E1.1(b). (The district court also granted an additional two-point reduction under the "safety valve" provision of U.S.S.G. § 5C1.2.)

***79 DISCUSSION**

A. *Rogers' Fourth Amendment Claim.*

Rogers now concedes that the initial stop-and-frisk—and the removal of the rolled-up paper bag from her coat pocket—was lawful under the standard of *Terry v. Ohio.* She contends only that the act of *opening* the paper bag *after* it was taken from her pocket was unlawful. More specifically, she argues (1) that what Officer Mason felt, together with Rogers' own suspicious conduct, did not give the officers probable cause to open the paper bag and search for contraband; and (2) that the act of opening the paper bag was not justified as a protective measure under *Terry* because there was no reasonable basis to believe that it contained a weapon.

In *Minnesota v. Dickerson,* 508 U.S. 366, 377, 113 S.Ct. 2130, 2137, 124 L.Ed.2d 334 (1993), the Supreme Court concluded that a police officer may seize contraband detected by sense of touch during a protective patdown search so long as the officer is acting within the bounds of *Terry* at the moment when probable cause arises to believe that contraband is present:

> 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.

Id. at 375–76, 113 S.Ct. at 2136–37. Conversely, an officer oversteps the line if the search for contraband continues *after* the officer realizes that no weapons are present; even if probable cause to believe that contraband is present arises thereafter, the seizure would be unlawful. The Court in *Dickerson* found that that search was unlawful because the officer continued to squeeze and manipulate the contents of the suspect's pocket after having established that it contained no weapon. *Id.* at 378, 113 S.Ct. at 2137.

As in *Dickerson,* the question here is whether the officers were acting within the bounds of a permissible protective patdown search when probable cause arose to believe that

Rogers' pocket contained contraband. Viewing the evidence in the light most favorable to the government, *see United States v. Mussaleen,* 35 F.3d 692, 697 (2d Cir.1994), we conclude that the police were acting well within the bounds of *Terry.* Sergeant Mason was conducting a lawful protective patdown search (a point that Rogers concedes) when he felt the heavy object in Rogers' coat pocket. He manipulated the object for "a few seconds" to determine what it was, and felt "a hard object and then a softer object." At that point, Mason was not yet able to exclude the possibility that there was a weapon in the pocket, so that the search was still within the bounds of *Terry,* and Mason had become "fairly certain" the pocket contained drugs. That belief, combined with Rogers' evasive and suspicious conduct, gave the officers probable cause to search Rogers' pocket for contraband. The police were therefore permitted to remove and open the rolled-up paper bag.

Rogers argues that Mason lacked probable cause to believe that drugs were present because (1) Mason admitted under cross-examination that Rogers' pocket could have contained "anything at all;" and (2) the identity of the object in her pocket was not "immediately apparent" as *Dickerson* requires. We disagree.

Mason's open-minded concession that Rogers' pocket *could have* contained "anything at all" does not preclude his having probable cause to believe that the pocket contained drugs. Probable cause "merely requires that the facts available to the officer would warrant a man of reasonable caution in the belief that certain items *may be* contraband." *Texas v. Brown,* 460 U.S. 730, 742, 103 S.Ct. 1535, 1543, 75 L.Ed.2d 502 (1983) (plurality opinion) (citation and quotations omitted) (emphasis added). Officer Mason's fair certainty that what he felt in Rogers' pocket was contraband, coupled with Rogers' suspicious conduct, would warrant a person of reasonable caution to believe that drugs may be present, even without excluding the hypothesis that the contents could possibly be something else altogether.

***80** Rogers argues that it was not "immediately apparent" that the paper bag contained drugs. But, as *Dickerson* illustrates, the Supreme Court has used the term "immediately apparent" to mean anytime in the course of a search conducted within the bounds of *Terry.* In other words, probable cause to believe an object is contraband must arise while an officer is conducting a permissible patdown search. *See Dickerson,* 508 U.S. at 378–79, 113 S.Ct. at 2138–39. As noted, probable cause to believe that contraband was present arose when Sergeant Mason, acting within the bounds of a protective patdown search, grabbed the object in Rogers' pocket, manipulated it for a few seconds, and concluded that it was probably drugs. The incriminating character of the object was therefore "immediately apparent."

We agree with the district court that the act of opening the paper bag was permissible under *Dickerson,* and so we need not address Rogers' arguments regarding whether that act also was (or was not) permissible under *Terry.*

B. *Rogers' Sentencing Claim.*

Rogers argues that the district court erred in failing to grant her a one-level adjustment for acceptance of responsibility under subsections (1) and (2) of § 3E1.1(b) of the Guidelines. To be eligible for such an adjustment, a defendant must satisfy the threshold requirements of § 3E1.1(b) and assist authorities in the investigation or prosecution of her case by either (1) "timely providing complete information to the government concerning [her] own involvement in the offense"; or (2) "timely notifying authorities of [her] intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently." U.S.S.G. § 3E1.1(b)(1) & (2).

On appeal, Rogers claims that she qualifies for the one-level adjustment under both subsections (1) and (2). The government argues that Rogers waived her claim for an adjustment under subsection (1) because she did not argue that point below. "Generally, issues not raised in the trial court, including sentencing issues, will be deemed waived on appeal in the absence of plain errors or defects affecting substantial rights." *United States v. Gomez,* 103 F.3d 249, 254 (2d Cir.1997) (citation and quotations omitted). Because the record discloses no instance, either in Rogers' presentence submission or at the sentencing hearing, in which she sought an adjustment for timely disclosure of complete information concerning her involvement in the offense, we conclude that she waived her claim for an adjustment under subsection (1).

But Rogers did seek an adjustment under subsection (2), on the ground that she offered to enter a conditional guilty plea and (when the government rejected the offer) agreed to a bench trial on stipulated facts. Rogers now argues that this was "the functional equivalent of a guilty plea," because it imposed no greater burden on the government or the court than an ordinary guilty plea and thereby achieved the same conservation of resources. Appellant's Brief at 21.

To illustrate this point, Rogers points out that the full trial transcript consists of 12 pages, "less than most Rule 11 guilty plea proceedings." *Id.*

We conclude that the district court did not abuse its discretion in denying Rogers a one-level adjustment under subsection (2). To qualify for an adjustment under that subsection, a defendant must offer to plead guilty at a point in the proceedings sufficiently early to allow the government to avoid preparing for trial and to permit the court to schedule its calendar efficiently. *See* U.S.S.G. § 3E1.1 Commentary, Application Note 6. In this case, the only defensive measure available to Rogers was to argue that the evidence seized from her pocket was inadmissible. Thus, in terms of preparation by the government and the investment of judicial time, the suppression hearing was the main proceeding in this case. As the district court observed, "the case was effectively tried with the motion to suppress." Once that motion was denied, convicting Rogers became child's play for the prosecution. Rogers' offer to enter a conditional guilty plea and her bench trial on stipulated facts, coming *after* the suppression hearing, did not come sufficiently early in the proceedings ***81** to allow the court or the government to avoid the burdens of litigating the case. *See United States v. Gonzales,* 19 F.3d 982, 984 (5th Cir.), *cert. denied,* 513 U.S. 887, 115 S.Ct. 229, 130 L.Ed.2d 154 (1994). Accordingly, the district court had discretion to deny the one-level adjustment under subsection (2).

CONCLUSION

We have considered all of Rogers' arguments and find them meritless. The judgment of the district court is therefore affirmed.

All Citations

129 F.3d 76

Footnotes

* Honorable Jane A. Restani, United States Court of International Trade, sitting by designation.

End of Document

670 F.2d 323
United States Court of Appeals,
District of Columbia Circuit.

UNITED STATES of America
v.
Charles M. RUSSELL, Appellant.

No. 80-1139.
|
Jan. 22, 1982.
|
Certiorari Denied June 7, 1982.
|
See 102 S.Ct. 2909.

Synopsis
Defendant was convicted in the United States District Court for the District of Columbia, Howard F. Corcoran, J., of possession of heroin with intent to distribute, carrying a pistol without a license and possession of a firearm after a prior felony conviction, and he appealed. The Court of Appeals, 655 F.2d 1261, affirmed in part and reversed in part on grounds that the warrantless search of a grocery bag found in a hatchback was not justified absent evidence that the officer inferred the contents from its shape or feel or that the bag was open and its contents in plain view and that the search was not justified on the ground that paper bags offer only minimal protection against incidental or deliberate intrusions. The parties were given an opportunity to brief that issue in light of a recent Supreme Court decision. On rehearing, the Court of Appeals, Ginsburg, Circuit Judge, held that a hatchback type car's trunk area, which is reachable without exiting the vehicle, properly ranks as part of the interior or passenger compartment of the car, and, therefore, the seizure of a grocery type bag from the hatchback incident to an arrest was authorized.

Prior opinion vacated in part.

Spottswood W. Robinson, III, Chief Judge, filed a separate opinion concurring in the judgment.

***324** ****166** On Petition for Rehearing (Cr. No. 79-00479).

Before ROBINSON, Chief Judge, and WILKEY and GINSBURG, Circuit Judges.

Opinion for the Court filed by Circuit Judge GINSBURG.

Separate statement concurring in the judgment filed by Chief Judge SPOTTSWOOD W. ROBINSON, III.

GINSBURG, Circuit Judge:

INTRODUCTION

In this case, involving two paper bags seized from a car and opened without a warrant, we confront fluid, variously interpreted strands of Fourth Amendment law. The bags were uncovered in the course of a search the police conducted after they had probable cause to believe that drugs were in the car. As described by one of the police officers, the car was a "1979 Mustang, ... a hatchback type, in that the trunk area is accessible to the passengers from the rear seat, or if the driver wants to lean over." Suppression Hearing Tr. at 12. In the course of the search, Russell, driver of the car, and the other three occupants were ordered out of the vehicle. Russell was held in custody at the scene and subjected to a personal search by a back-up officer. One of the two paper bags in contention was found under the front seat; it contained a handgun. The other, a large grocery-type bag covered by clothing, was seized from the hatchback; it contained, inter alia, packets of heroin.

In our initial decision, issued May 15, 1981,[1] in response to the government's plea for a "paper bag" or "unworthy container" exception to the warrant requirement, we cited our recent, en banc disposition in United States v. Ross, 655 F.2d 1159 (D.C.Cir.1981), cert. granted, -- U.S. --, 102 S.Ct. 386, 70 L.Ed.2d 205 (1981) (No. 80-2209). Ross noted the Supreme Court's admonitions that the reasonableness of a search does not obviate the need for a warrant and that the exceptions to the warrant requirement are few in number and well-contained;[2] the Ross decision held that the Fourth Amendment warrant requirement forbids the warrantless opening of a closed, opaque paper bag to the same extent that it forbids the warrantless opening of other closed, opaque containers, for example, a carryall of leather, nylon, or cotton, a silk purse, a plastic sack. We reasoned in Ross that paper bags or envelopes, whether marked Tiffany's or Five and Dime, could not be set apart from more sturdy or costly containers in a manner that makes either ***325** ****169** theoretical or practical sense. 655 F.2d at 1170.[3]

Relying on Ross to rule out creation of an "unworthy container" exception in Russell, we proceeded to determine whether an established exception to the warrant requirement justified opening either bag. 655 F.2d at 1264. The bag with the handgun, we believed, fell securely within the well-established "plain view" exception. The officer who came upon that container indicated in his testimony that he felt the outline of the gun as he grasped the paper bag. "Plain view," we think it safe to say, encompasses "plain touch," and probably "plain smell" as well. The idea is, the incriminating contents (contraband or evidence of crime) are "immediately apparent." See 2 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment s 7.5 (1978); id. s 7.2(e), at -- & nn.102.29-.36 (Supp.1982); Y. Kamisar, The "Automobile Search" Cases: The Court Does Little to Clarify the "Labyrinth of Judicial Uncertainty," at 54-56 (to be published in J. Choper, Y. Kamisar & L. Tribe, The Supreme Court: Trends and Developments 1980-81 (1982)).

The bag in the hatchback, however, was another matter. Apparently, it was not transparent, torn, or partially opened. No evidence indicated that incriminating contents could be inferred from the bag's outward appearance-its configuration, feel, or smell. See Arkansas v. Sanders, 442 U.S. 753, 764-65 n.13, 99 S.Ct. 2586, 2593 n.13, 61 L.Ed.2d 235 (1979); Robbins v. California, 453 U.S. 420, --, 101 S.Ct. 2841, 2846, 69 L.Ed.2d 744 (1981); Y. Kamisar, supra, at 55 ("main thrust of (Sanders) footnote 13 is a distinction between containers that 'proclaim their contents' (... by their 'smell' or 'feel' or 'distinctive configuration') and those that do not") (emphasis in original). The "unworthy container" plea apart, the government suggested no exception to the warrant requirement that would justify the on-the-spot warrantless opening. Accordingly, we reversed the district court on this point, and held that the evidence found in the grocery bag seized from the hatchback should have been suppressed.

On July 1, 1981, some six weeks after our initial decision in this case, the Supreme Court decided New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768, and Robbins v. California, 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 744.[4] Taken together, these decisions distinguish (1) items, whether exposed or contained, found in a car passenger compartment from (2) containers, whether solid or insecure, placed in a car trunk. The former, it is now clear from the Court's Belton decision, fall within the "search-incident-to-arrest" exception to the warrant requirement. The latter, it appears from Robbins, are currently governed by the "automobile exception" or Carroll Doctrine,[5] as narrowed in Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), and Robbins.[6] See Virgin Islands v. Rasool, 657 F.2d 582, 590 (3d Cir. 1981). Given the not fully anticipated elaborations provided by the Supreme Court, and in view of the government's pending petition for rehearing, we invited the parties to brief the question whether Belton requires modification of this court's May 15, 1981, judgment.

***326** ****168** In Belton, the Court supplied "a straightforward rule, easily applied"[7] in response to the question: "When the occupant of an automobile is subjected to a lawful custodial arrest, does the constitutionally permissible scope of a search incident to his arrest include the passenger compartment of the automobile in which he was riding?" 101 S.Ct. at 2861. Roger Belton challenged police action occurring immediately after he was ordered out of a car stopped for speeding, and placed under arrest for unlawful possession of marihuana. The police officer searched the passenger compartment and found on the back seat a black leather jacket belonging to Belton. The officer unzipped one of the jacket pockets and discovered cocaine inside.

Noting the unsettled state of lower court decisions, 101 S.Ct. at 2863, the Court established a "workable rule" which it derived from prior cases "suggest(ing) the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary item.' " 101 S.Ct. at 2864 (quoting Chimel v. California, 395 U.S. 752, 763, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685 (1969)). Building upon that generalization, the Court held "that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." Id.

"It follows from this conclusion," the Court continued, "that the police may also examine the contents of any containers (whether they be open or closed) found within the passenger compartment, for if the passenger compartment is within the reach of the arrestee, so also will containers in it be within his reach." Id. "Container," the Court clarified, "denotes any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like." Id. at n.4. The Court further specified that its "holding encompasses only the interior of the passenger

compartment of an automobile and does not encompass the trunk." Id.

While the expanded search-incident-to-arrest rule for car interiors announced in Belton does not apply to car trunks, the grocery-type bag in this case was found in the hatchback of the automobile Russell drove. The question at issue, then, is whether the Belton rule encompasses hatchbacks. See id. 101 S.Ct. at 2869 (Brennan, J., dissenting). This question has already attracted scholarly comment. See Y. Kamisar, supra, at 39-41; 30 Crim.L.Rep. (BNA) 2065, 2066 (Oct. 21, 1981) (summarizing remarks of Prof. Yale Kamisar); Kamisar, Fourth Amendment Hatchback, Washington Post, Oct. 15, 1981, at A29. We note particularly the comment of an authority the Court cited in Belton, Professor Wayne R. LaFave, author of Search and Seizure: A Treatise on the Fourth Amendment. Belton, Professor LaFave observes, "rejects a case-by-case (approach) in favor of a standardized procedure" that police officers may follow routinely. 2 W. LaFave, supra, s 7.1, at -- & n.9.2 (Supp.1982). In keeping with the Belton majority's intent "to avoid case-by-case evaluations of control," id. at -- (text preceding n.46.9), LaFave suggests that "passenger compartment," for purposes of the Belton rule, is properly read "as including all space reachable without exiting the vehicle." Id. at -- (distinguishing, however, areas that would require "some dismantling of the vehicle," for example, door panel interiors, and other places to which there is "virtually no chance the arrestee could have acquired access") (emphasis in original).

A recessed luggage compartment in the back of a station wagon, on the other hand, has been described as "the functional equivalent ***327** ****167** of a trunk." Robbins, supra, 101 S.Ct. at 2857 (Stevens, J., dissenting). The Robbins decision held that packages wrapped in opaque plastic and sealed with a tape strip could not be opened without a warrant after seizure from a station wagon luggage compartment. (The police gained access to the compartment by taking the keys from the ignition, opening the tailgate, lifting the floor rug, and pulling up a handle set flush in the deck.) But, as Professor Yale Kamisar points out, items in a hatchback are more accessible than those in the rear of a station wagon: "(M)any, if not most, courts would say they are within 'lunging distance' of even those in the front seats." Y. Kamisar, supra, at 94.

In the case before us, it does not appear that the hatchback was outside the control of the car occupants (as a car trunk or a recessed luggage compartment in the rear of a station wagon would have been) immediately before the process of arrest. See Robbins, supra, 101 S.Ct. at 2848-49 (Powell, J., concurring in the judgment). We therefore conclude, in light of the emphasis the Supreme Court placed in Belton on a workable definition of the area of a car subject to warrantless search in conjunction with a lawful custodial arrest,[8] that a hatchback reachable without exiting the vehicle properly ranks as part of the interior or passenger compartment. On that basis, we hold that the broadened search-incident-to-arrest doctrine declared in Belton covers Russell's case as well.[9]

CONCLUSION

In accordance with the foregoing, we vacate our May 15, 1981, decision to the extent that it reversed in part the judgment of the district court, and hereby affirm the district court's judgment in all respects.

SPOTTSWOOD W. ROBINSON, III, Chief Judge, concurring in the judgment:

In earlier condemning the search of the heroin-filled paper bag giving birth to this litigation, we adhered faithfully to this court's en banc decision in Ross.[1] The Supreme Court has now awarded a writ of certiorari in Ross[2] to deal further with the problem of warrantless searches of containers found in vehicles, an area in which its recent rulings in Robbins[3] and Belton[4] frequently crisscross in operation. The statement of questions upon which the writ was granted focused on that very problem, and the Court made known the possibility that Robbins will be reexamined.[5] Since Belton involved a warrantless search of the pocket of a jacket lying on the rear seat of an automobile-a search of a container of sorts-it is not inconceivable that the Court may clarify this area of Fourth Amendment jurisprudence in a way that impacts upon Belton as well.[6]

This is but one reason for caution against an expansive declaration of the current status of the law governing searches of containers ***328** ****170** within vehicles. In Belton, the Court has admittedly gone a long way toward establishing a clear and simple test by which the constitutionality of such searches may be measured, but even now fundamental questions in this troublesome area remain unanswered. How far does Belton's new variation of the search-incident-to-arrest doctrine extend? Is it grounded in assumptions about

distinctive features of automobiles to such extent that the rule is limited to searches of automobiles?[7] Does it permit a defendant ever to argue that these generalized assumptions are inapplicable to his case because, for example, of the nature of a container searched, unorthodox physical characteristics of the vehicle-or, for that matter, of the defendant himself-or the time elapsing between arrest and search? Does the presence or absence of probable cause to search the vehicle affect the permissible scope of a search of containers within it?[8] I pose these questions only to emphasize that even Belton's boundaries are not yet well-defined, and that the rationale necessary to discern those outer perimeters has not yet been fully articulated.

It has been our wont to proceed gingerly in explicating newly-announced constitutional principles. This circumspection is especially appropriate when we may anticipate enlightenment by the High Court at an early date. I question the wisdom of any attempt at this juncture to lay down open-ended legal principles regarding container-within-vehicle searches. I therefore limit my concurrence to the judgment today announced by the court.

In so doing, I underscore several factual elements of this case that lead me to the conclusion that the search of the paper bag should be upheld. The bag was not, according to the record, fastened or transported in any way that rendered it even briefly impenetrable by occupants of the vehicle. It was not insulated, by partition or other stationary obstacle, from access by the passengers. The police officers had probable cause to believe that the car contained contraband, and they conducted the search immediately after the four occupants were ordered to get out. Given these facts I am satisfied that the instant search was undertaken in circumstances sufficiently close to those in Belton to be adjudged constitutional under even the narrowest reading of that decision.

All Citations

670 F.2d 323, 216 U.S.App.D.C. 165

Footnotes

1 United States v. Russell, 655 F.2d 1261 (D.C.Cir.1981).

2 655 F.2d at 1168-69.

3 But see 2 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment s 7.2, at -- & nn.102.1-.27 (Supp.1982).

4 Belton involved the search of a jacket seized from the back seat of a car immediately following defendant's arrest at the scene; Robbins involved the search of plastic-wrapped packages seized from a recessed luggage compartment under a floor rug in the rear of a station wagon. The search in Robbins occurred after the police had put the defendant in a patrol car. The Court upheld the warrantless search in Belton, but declared the warrantless search in Robbins violative of the Fourth Amendment.

5 Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925).

6 The staying power of Robbins is in doubt. In granting certiorari in Ross, supra, the Court directed the parties “to address the question whether the Court should reconsider Robbins.” Cf. Y. Kamisar, supra, at 62 (forecasting application of the “automobile exception” or Carroll Doctrine to closed containers, regardless of their durability, found in vehicles).

7 101 S.Ct. at 2863; see id. at 2864 (“When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority.”).

8 101 S.Ct. at 2863-64.

9 Our decision is focused narrowly and specifically on the precise question whether Belton's rule and rationale encompass the hatchback in this case. No other question is framed or answered by the decision. We disavow any design “to lay down ... legal principles,” and intend no “expansive declaration of the current status of the law governing searches of containers within vehicles.” These broadsides apart, we are in full agreement with the views separately stated by Chief Judge Robinson. We share, particularly, Chief Judge Robinson's emphasis on the need, in this still-evolving area of the

law, “for further enlightenment from Higher Authority.” See United States v. Martino, 664 F.2d 860, 881 (2d Cir. 1981) (Oakes, J., concurring).

1 United States v. Ross, 210 U.S.App.D.C. 342, 655 F.2d 1159 (1981).

2 United States v. Ross, 454 U.S. 891, 102 S.Ct. 386, 70 L.Ed.2d 205 (1981).

3 Robbins v. California, 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 744 (1981).

4 New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981).

5 See -- U.S. --, 102 S.Ct. 386, 70 L.Ed.2d 205 (1981).

6 See Robbins v. California, supra note 3, 453 U.S. at --, 101 S.Ct. at 2850-2851, 69 L.Ed.2d at 756 (Powell, J., concurring in the judgment); id. at --, 101 S.Ct. at 2855, 69 L.Ed.2d at 762 (Stevens, J., dissenting).

7 See New York v. Belton, supra note 4, 453 U.S. at --, 101 S.Ct. at 2869, 69 L.Ed.2d at 781 (Brennan, J., dissenting).

8 Several Justices have suggested that the “automobile exception” should be extended to cover examination of all objects within a vehicle that police have probable cause to search. See, e.g., Robbins v. California, supra note 3, 453 U.S. at --, 101 S.Ct. at 2851, 69 L.Ed.2d at 756-757 (Blackmun, J., dissenting); id. at --, 101 S.Ct. at 2855-2859, 69 L.Ed.2d at 762-767 (Stevens, J., dissenting); New York v. Belton, supra note 3, 453 U.S. at --, 101 S.Ct. at 2865, 69 L.Ed.2d at 775-776 (Rehnquist, J., concurring).

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