

1997

Utah v. Hernandez : Brief of Appellee

Utah Court of Appeals

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Jan Graham; Attorney General; Attorney for Appellee.

James M. Retallick; Weber County Public Defender; Attorney for Appellant.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff/Appellee, : Case No. 970399-CA
v. :
SERGIO HERNANDEZ, : Priority No. 2
Defendant/Appellant. :

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION FOR UNLAWFUL POSSESSION OF
A CONTROLLED SUBSTANCE (COCAINE), A THIRD DEGREE
FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8 (1996), IN
THE SECOND DISTRICT COURT, WEBER COUNTY, STATE OF
UTAH, THE HONORABLE ROGER S. DUTSON, PRESIDING

JAMES M. RETALLICK (5134)
Weber County Public Defender
2564 Washington Boulevard
Ogden, Utah 84401
(801) 532-5444

Attorney for Appellant

BARNARD N. MADSEN (4626)
Assistant Attorney General
JAN GRAHAM (1231)
Attorney General
160 E. 300 S., 6th Floor
Salt Lake City, Utah 84114-0854
Telephone: (801) 366-0180

RICHARD A. PARMLEY (2528)
Deputy Weber County Attorney

Attorneys for Appellee

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(801) 532-5444

Attorney for Appellant

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Assistant Attorney General
JAN GRAHAM (1231)
Attorney General
160 E. 300 S., 6th Floor
Salt Lake City, Utah 84114-0854
Telephone: (801) 366-0180

RICHARD A. PARMLEY (2528)
Deputy Weber County Attorney

Attorneys for Appellee

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff/Appellee, : Case No. 970399-CA
v. :
SERGIO HERNANDEZ, : Priority No. 2
Defendant/Appellant. :

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF THE PROCEEDINGS

Defendant appeals his conviction for possession of a controlled substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8 (1996). This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1997).

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

1. Was the pat-down search of the large bulge in defendant's pocket justified by reasonable suspicion?
2. Was the seizure of the film canister from defendant's pocket justified by probable cause based on the totality of circumstances?

Since the facts are undisputed, review of defendant's case is limited to the application of law to those facts. Whether a specific set of facts gives rise to reasonable suspicion or to probable cause is a determination of law and is reviewable

nondeferentially for correctness with a measure of discretion to the trial judge when applying that standard to a given set of facts. State v. Pena, 869 P.2d 932, 939 (Utah 1994); see also State v. McGrath, 928 P.2d 1033, 1036 (Ct. App. 1996).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

United States Constitution, Amendment IV:

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.

Utah Constitution, Art. I, § 14:

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 warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

Utah Code Ann. § 77-7-2 (1986):

A peace officer may make an arrest under authority of a warrant or may, without warrant, arrest a person:

(1) for any public offense committed or attempted in the presence of any peace officer; "presence" includes all of the physical senses or any device that enhances the acuity, sensitivity, or range of any physical sense, or records the observations of any of the physical senses;

(2) when he has reasonable cause to believe a felony has been committed and has reasonable cause to believe that the person arrested has committed it;

(3) when he has reasonable cause to believe the person has committed a public offense, and there is reasonable cause for believing the person may:

- (a) flee or conceal himself to avoid arrest;
- (b) destroy or conceal evidence of the commission of the offense; or

(c) injure another person or damage property belonging to another person.

Utah Code Ann. § 77-7-15 (1980):

A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.

Utah Code Ann. § 77-7-16 (1980):

A peace officer who has stopped a person temporarily for questioning may frisk the person for a dangerous weapon if he reasonably believes he or any other person is in danger.

STATEMENT OF THE CASE

Defendant was initially charged with possession of a controlled substance (cocaine) with intent to distribute, a second degree felony, in violation of Utah Code Ann. § 58-37-8 (1996) (R. 1). The charge was later amended to simple possession, a third degree felony, in violation of Utah Code Ann. § 58-37-8 (1996) (R. 41). Before trial, defendant moved to suppress the drugs seized from his person (R. 16-32). After the trial court denied the motion in an oral ruling (R. 116-120),¹ defendant was convicted by a jury and sentenced to serve zero-to-five years in prison, with credit for time served (R. 61, 67).² Defendant timely appealed (R. 69-70).

¹ The evidence from the preliminary hearing (R. 75-96), the parties' arguments on the motion (R. 97-116), and the trial court's oral ruling (R. 116-120) are at addendum A.

² Because defendant was an illegal alien, the trial court authorized his release for deportation (R. 67).

STATEMENT OF FACTS

Introduction

The evidence is undisputed since defendant chose not to testify and he has not challenged the trial court's findings of fact (see R. 118-120). In his brief, however, defendant simply ignores crucial facts that undermine his position. His omissions will be noted below.

Surveillance and Seizure

A police officer seized a film canister containing cocaine from defendant's pocket following surveillance and a pat-down search.

Surveillance. Two Ogden City police officers on bike patrol had been carefully watching the area in front of the Marion Hotel after the hotel manager and several other citizens had complained about "transient type Hispanics" selling drugs there (R. 76-77). In the previous two years, one of the officers on patrol had made "over a hundred" drug arrests in that vicinity (R. 78, 118).

Apparent drug transaction. While approaching the area on bikes at about 5:00 p.m. on April 17, 1997, the two officers observed several white males standing in front of the hotel (R. 90). While the officers watched from less than a hundred feet away (R. 83), defendant and another Hispanic man stopped to talk to two of the men (R. 76-77). Defendant quickly took something from his pocket and handed it to one of the men (R. 77, 91; see R. 118-119). One of the officers saw that the man had currency in his hand

during his exchange with defendant (R. 77, 84).³ After the exchange, defendant and his Hispanic companion talked briefly, looked at the officers, and started walking in the other direction (R. 78, 91). The officer who had made multiple drug arrests in this area suspected that he had just witnessed another drug transaction (R. 3, 79, 118).

Initial investigation. To investigate, the officers first approached the man, named Ballard, who was still standing in front of the hotel and who had been a party to the exchange with defendant (R. 92). They asked Mr. Ballard if he knew defendant. Id. Ballard said they both lived at "St. Anne's." Id. The officers then asked what had changed hands. Id. Ballard replied that defendant owed him a dollar, that he had asked for the money, and that defendant only had approximately fifty cents in change which defendant handed him (R. 78, 92). Ballard took change out of his *left* pocket to show the officers, but the officer who could best see the exchange had seen Ballard put whatever defendant handed him into his *right* pocket (R. 78; see R. 85). The officers did not further question Ballard at that time (R. 78, 84-85, 92-93, 119).

Questioning defendant. Instead, the two officers rode their bikes to where defendant and his companion were getting ready to cross the street. One of the officers asked defendant, "[D]o you mind if we talk to you about your money transaction with

³ The other officer's view was obstructed because he was closest to the building, and there were several other men standing against the side of the building (R. 92). However, he did observe that the recipient "reached out" to defendant to begin the transaction (R. 91).

your friends up the street?" Defendant shrugged and said, "[S]ure." The officer then asked, "[D]o you have any weapons or do you have any I.D. on you?" Defendant denied having any weapons, and started pulling everything out of his pants pockets (R. 79, 93).

Large bulge in defendant's pocket. Defendant was wearing bulky, loose-fitting pants with large pockets (R. 86). Defendant was also wearing a large oversized flannel shirt over a T-shirt which both hung down below his pants pockets (R. 93). When defendant pulled up his shirts to reach into his pockets, the officers saw a large bulge in defendant's left front pants pocket (R. 80, 94). Defendant pulled some change and his wallet from other pockets. After defendant pulled a wad of toilet tissue from his left pants pocket, both officers could still see a large bulge in that pocket (R. 79-80, 94). Defendant did not immediately produce identification, but stood with the contents he had pulled from his pockets in his hands (R. 3, 80).

Defendant's three denials. One of the officers asked defendant what else he had in his pocket. Defendant said, "[N]othing."⁴ The officer said, "[I can] still see something in your pocket. You have a pretty good bulge in your pocket." Defendant responded, "I have nothing else in my pocket." The officer asked again, "[W]hat do

⁴ Defendant's marshaling of facts in support of reasonable suspicion stops here. He discusses his denial, but fails to mention his three, specific denials in response to the officer's questions (see Def. Br. at 4, 7).

you have in your pocket?" Id. Defendant again replied, "[N]othing." (R. 80; see R. 119).

Suspected weapon. Neither officer could tell what the bulge was (R. 80, 94). It appeared "big and round," was not head-on, but was "twisted . . . sideways" in defendant's pocket (R. 80, 85-88, 94). Both officers thought it could have been a weapon (R. 80, 88, 94). One of the officers knew from experience that people involved in drug transactions often carry weapons, and he thought that, from its appearance, the bulge could have been "a small caliber gun" (R. 88).⁵

Furtive movement; pat-down. After his third denial, defendant started to shove the wadded-up toilet paper back into his left pocket (R. 80).⁶ The officer who suspected that the bulge in that pocket might be a small caliber gun believed defendant was trying to hide what was in his pocket, and so, "on the outside of the pocket," the officer "reached and grabbed to feel what it was" and "to see if it was a weapon." Id.

The officer felt a lid on top of a container, and immediately recognized the bulge to be a plastic film canister, since he had taken "a lot of plastic film canisters off of a

⁵ Defendant's recitation of facts completely ignores the undisputed testimony by the officers summarized in this paragraph (see Def. Br. at 4, 6-7).

⁶ Defendant ignores this crucial fact (see Def. Br. at 4, 6-7).

lot of other people who deal in narcotics," and since, as a photographer, he had a lot of them himself (R. 80-81; see also R. 4, 94, 119-120).⁷

Defendant's fourth denial, furtive movement; seizure. The officer then asked defendant one last time what he had in his pocket (R. 81). For the fourth time, defendant said, "Nothing," and began reaching his hand back into the pocket (R. 81).⁸ The officer thought defendant was going to take the lid off the canister, so he took the canister out of defendant's pocket. Id. (see R. 120).

The officer opened the lid and found "eight individually wrapped packages of white powdery substance" that had been hot-sealed (R. 82-81). In the officer's experience, drugs individually packaged in this way are consistent with distribution, as opposed to individual use (R. 82). The other officer went back to talk again with Mr. Ballard and found that he had no currency, only the change he had already shown the officers (R. 93; see also R. 77, 84). Defendant was arrested and charged with possession of a controlled substance with intent to distribute (R. 1-2, 41).

⁷ In response to a question about his experience with film canisters and narcotics, the officer testified that "at least 95 percent of the time if I find a film canister, it is either empty or got residue in it, or it has some narcotics in it" (R. 81).

⁸ Defendant ignores this undisputed testimony (see Def. Br. at 4, 6-7).

SUMMARY OF ARGUMENTS

Point I. The pat-down search of the large bulge in defendant's pocket was justified by reasonable suspicion. An officer observed defendant's participation in an apparent drug transaction in front of a hotel, an area notorious for illegal drug sales. When approached and asked whether he had any weapons or identification, defendant emptied his pockets leaving a large bulge still visible in his left front pants pocket. Defendant nevertheless denied three times having anything in his pocket. Based on the size and shape of the bulge, knowledge that persons involved in drug transactions often carry weapons, and defendant's denials, the officer reasonably believed that the bulge in defendant's pocket could be a weapon. When defendant began to reach into the pocket, the officer was justified in conducting a pat-down search to determine if it contained a weapon.

Point II. The seizure of the item from defendant's pocket was justified by probable cause based on the totality of circumstances. When he touched it through defendant's clothing, the officer immediately recognized the large bulge as a film canister, an item the officer knew is commonly used to transport drugs. Based on the officer's observation of defendant's participation in an apparent drug transaction, defendant's repeated denials that he had anything in his pocket, and the results of the pat-down search, the officer had probable cause to seize the film canister. After the

pat-down search, when defendant denied again having anything in his pocket and began reaching into the pocket again, the officer was justified in seizing the film canister.

ARGUMENT

Point I

THE PAT-DOWN SEARCH OF THE LARGE BULGE IN DEFENDANT'S POCKET WAS JUSTIFIED BY REASONABLE SUSPICION

Defendant does not dispute that the officers had reasonable suspicion to detain and question him.⁹ Instead, he challenges the basis for the subsequent pat-down search of the large bulge in his pants pocket (Def. Br. at 6). Defendant argues that the officers' "sole reason for suspecting a weapon was their belief that a drug transaction

⁹ This Court recognizes three levels of police-citizen encounters:

(1) An officer may approach a citizen at anytime [sic] and pose questions so long as the citizen is not detained against his will; (2) an officer may seize a person if the officer has an "articulable suspicion" that the person has committed or is about to commit a crime; however, the "detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop;" (3) an officer may arrest a suspect if the officer has probable cause to believe an offense has been committed or is being committed.

State v. Struhs, 940 P.2d 1225, 1227 (Utah App. 1997) (quoting State v. Deitman, 739 P.2d 616, 617-18 (Utah 1987) (per curiam) (quoting United States v. Merritt, 736 F.2d 223, 230 (5th Cir. 1984), cert. denied sub nom. 106 S. Ct. 2250 (1986)).

had transpired." Id. He asserts, "At no time did [either officer] express any articulable reason that they suspected this Defendant of carrying a weapon." Id.

These central assertions are contradicted by the officers' undisputed testimony (see R. 79-80, 87-88, 94). Indeed, defendant's argument fails because he ignores or omits crucial facts and circumstances that don't support his position.

A. Terry Pat-down

In Terry v. Ohio, 88 S.Ct. 1868 (1968), the Supreme Court held that an officer may conduct a pat-down of a suspected criminal for dangerous weapons if the officer reasonably believes the suspect to be armed and dangerous. The Terry Court specifically held that a pat-down is reasonable (1) "where a police officer observes unusual conduct" which he interprets "in light of his experience" as indicating possible criminal activity and present danger, (2) "where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and [3] where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or other's safety." Id. at 1884. A reviewing court considers "whether a reasonably prudent man in [these] circumstances would be warranted in the belief that his safety . . . was in danger." Id. at 1883. A Terry pat-down must be "a carefully limited search of the outer clothing . . . in an attempt to discover weapons which might be used to assault [the officer]." Id. at 1884-1885; cf. Michigan v. Long, 103 S. Ct. 3469, 3481 (1983) (if officer has specific articulable facts which reasonably warrant the

belief that suspect is dangerous and may gain immediate control of weapons, officer can search suspect and nearby areas where weapon may be hidden).

Utah has codified Terry: "A peace officer who has stopped a person temporarily for questioning may frisk the person for a dangerous weapon if he reasonably believes he or any other person is in danger." Utah Code Ann. § 77-7-16 (1980).

B. Basis for Pat-Down Search: Reasonable Suspicion

In defendant's case, the trial court correctly concluded that the officer conducting the pat-down had a reasonable suspicion that defendant was armed and dangerous (see R. 118-120).

1. The officer "observed unusual conduct" which he interpreted "in light of his experience" as indicating possible criminal activity and present danger (Terry, 88 S.Ct. at 1884). The officer observed defendant stop to talk with a man in front of a hotel (a location notorious for illegal drug sales), quickly exchange something with the man, including currency, look at the officers, and begin walking in the other direction (R. 77-78, 84, 91). Based on his experience, the officer reasonably suspected that he had witnessed an illegal drug transaction (R. 76-79, 118). See Minnesota v. Dickerson, 113 S.Ct. 2130 (1993) (reasonable suspicion where suspect left notorious "crack house," made eye contact with police, began walking in the other direction); United States v. Magda, 547 F.2d 756 (2nd Cir. 1976) (stop justified where man exchanged

something with another in an area notorious for drug traffic, then rapidly turned away upon seeing police officer).

Likewise, based on his experience, the officer knew that people who use and transport illegal drugs often carry weapons (R. 88). See State v. Trujillo, 739 P.2d 85, 88-89 (Utah Ct. App. 1987) (officer entitled to assess the facts in light of his experience); see also State v. Dorsey, 731 P.2d 1085, 1092 (Utah 1986) (Zimmerman, J., concurring) (officer could reasonably assume individuals suspected of participating in moving large quantities of illegal drugs over long distances may be armed); State v. Chapman, 841 P.2d 725, 732 (Utah App. 1992) (Orme, J., dissenting) (courts justify pat-down searches "when the nature of the underlying offense raises reasonable suspicion that a weapon is present"), aff'd in part and rev'd in part, 921 P.2d 446 (Utah 1996).¹⁰

¹⁰ Cf. People v. Ratcliff, 778 P.2d 1371 (Colo. 1989) (right to frisk incident to stop re suspected street-corner drug sale, as officer "had previously encountered armed suspects under similar circumstances"); State v. Butler, 331 N.C. 227, 415 S.E.2d 719 (1992) (right to frisk incident to stop re suspected street corner drug sale, as "defendant, as a person reasonably suspected of involvement in drug traffic, might be armed"); United States v. Sinclair, 983 F.2d 598 (4th Cir. 1993) (proper to frisk suspected supplier of local drug dealer, given recent law enforcement "experience with drug traffickers"); United States v. Salazar, 945 F.2d 47 (2nd Cir. 1991) (stressing police "know that narcotics dealers frequently carry weapons"); United States v. Salas, 879 F.2d 530 (9th Cir. 1989) (proper to frisk one reasonably believed to be "a narcotics dealer"), cert. denied, 110 S.Ct. 502 (1989); United States v. Gilliard, 847 F.2d 21 (1st Cir. 1981) (firearms "tools of the trade" of drug traffickers), cert. denied, 109 S.Ct. 846 (1989).

2. In the course of investigating this behavior, the officer identified himself as a policeman and made reasonable inquiries (Terry, 88 S.Ct. at 1884). Since defendant was walking the other way, the officer first approached and contacted Mr. Ballard, the other party to the suspected transaction, and asked him to explain his actions (R. 92; see Utah Code Ann. § 77-7-15 (1980)). The information provided by Mr. Ballard was inconsistent with what the officer had just observed (R. 118-119). The officer had seen currency exchanged and Ballard place whatever defendant handed him in his *right* pants pocket (R. 77, 84, 91). But, when questioned, Ballard made no mention of currency, said that defendant had only given him some change to pay part of the money that he owed him, and pulled change out of his *left* pocket to show the officers (R.78, 92).

3. Nothing in the initial stages of the encounter served to dispel the officer's reasonable fear for his own or other's safety (Terry, 88 S.Ct. at 1884). Ballard's attempt to mislead the officer increased the officer's suspicion and led him to investigate the matter further with defendant (see R. 119). Cf. State v. Leonard, 825 P.2d 664, 669 (Utah App.) (implausible explanation, contradicting evidence known to police, justified arrest), cert. denied, 843 P.2d 1042 (1992). When he approached defendant, the officer asked if he had any weapons and asked him for identification (R. 79, 93). The initial question about weapons demonstrates that the officer already had some concern for his safety.

Defendant denied having any weapons, and began emptying his pockets (R. 79, 93). After defendant stood with the contents of his pockets in his hands, the officer still saw a large bulge in defendant's left front pants pocket (R. 79-80, 94). From what he saw of the big, round object, which was sideways in defendant's baggy pocket, the officer suspected that it could have been the barrel of "a small caliber gun" (R. 85-88). Cf. State v. Rochell, 850 P.2d 480, 483 (Utah App. 1993) (reasonable suspicion to frisk where officer saw bulge in defendant's pocket, believed the bulge could have been a weapon, and when asked whether he had any weapons, defendant "was hesitant in answering no").

When the officer asked what he had in his pocket, defendant replied, "[N]othing" (R. 80). When the officer pointed out to defendant that he could still see "a pretty good bulge" in defendant's pocket, defendant replied, "I have nothing else in my pocket." Id. When the officer asked a third time what he had in his pocket, defendant again replied, "[N]othing." Id., and R. 119.

Defendant's three denials, which were inconsistent with the large bulge the officer clearly saw in defendant's pocket, did nothing to dispel the officer's reasonable fear for his safety. Indeed, each denial only gave him more reason for concern (R. 119-120). See Wayne R. LaFare, 4 Search and Seizure § 9.5(a) at 250 ("if in response to inquiries the suspect gives an implausible account of his actions, this can help establish grounds to frisk") (citing State v. Valentine, 134 N.J. 536, 636 A.2d 505

(1994)); cf. United States v. Williams, 822 F.2d 1174, 1180-1181 (D.C. Cir. 1987)

("Williams attempts to conceal the bag could easily and naturally have caused the officer even greater anxiety [Therefore, his seizure of the bag] was motivated by a well-founded concern for his own safety").

Defendant gave the officer even more reason to fear for his safety when, after his denials, he began to shove his hand back into the bulging pocket. It then appeared not only that defendant might be armed, but that he was presently dangerous. In response, the officer reached out and grabbed the outside of defendant's pocket to feel whether the bulge was a weapon (R. 80).

The pat-down search by the officer was reasonable:

When 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 others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

Terry, 88 S.Ct. at 1881. Indeed, it was only when it appeared defendant was actually reaching for the suspected weapon that the officer conducted a pat-down search of the pocket. As in Terry, "a reasonably prudent man in [these] circumstances would be warranted in the belief that his safety . . . was in danger." Id. at 1883.

In summary, because the officer (1) observed defendant's participation in an apparent drug transaction, (2) knew from his experience that persons who use or

transport drugs often carry weapons, and (3) saw a large bulge in defendant's pants pocket that appeared to be a gun or other weapon, and because, when questioned, (4) defendant denied three times having anything in his pocket and (5) defendant then began reaching into the pocket, the officer had a reasonable suspicion that justified his pat-down search of the pocket.

Point II

THE SEIZURE OF THE FILM CANISTER FROM DEFENDANT'S POCKET WAS JUSTIFIED BY PROBABLE CAUSE BASED ON A TOTALITY OF THE CIRCUMSTANCES

Defendant is not arguing that the officer did not immediately detect that the bulge in his pocket was a film canister. Instead, defendant argues simply that, since a film canister is not "contraband per se" and possessing one is not "inherently illegal," the trial court erred when it concluded that the officer's seizure of the film canister from defendant was appropriate (Def. Br. at 7-8).

Defendant's argument ignores the totality of circumstances that provided probable cause for the seizure in his case. The question is not "per se" or "inherent" illegality, but whether, given all the facts and circumstances within the knowledge of the seizing officer, a person of reasonable caution would believe that the item may be contraband or other evidence of a crime. Texas v. Brown, 103 S.Ct. 1535, 1543-1544 (1983) (plurality opinion); State v. Dorsey, 731 P.2d 1085, 1088 (Utah 1986). In other

words, a film canister may or may not be contraband or evidence of a crime depending on the totality of circumstances.

A. Plain-Feel Seizure

In Minnesota v. Dickerson, 113 S.Ct. 2130, 2135 (1993), the Supreme Court held that "police officers may seize nonthreatening contraband detected during a protective patdown search" authorized by Terry. The Court reasoned,

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 2136.

Although applied by courts in a majority of federal and state jurisdictions,¹¹ the

¹¹ See, e.g., the following cases discussing "plain feel" or "plain touch": (federal) Dickerson, 113 S.Ct. 2130 (1993); United States v. Ashley, 37 F.3d 678 (D.C. Cir. 1994); United States v. Schiavo, 29 F.3d 6 (1st Cir. 1994); United States v. Ocampo, 650 F.2d 421 (2nd Cir. 1981); United States v. Ponce, 8 F.3d 989 (5th Cir. 1993); United States v. Rivers, 121 F.3d 1043 (7th Cir. 1997); United States v. Craft, 30 F.3d 1044 (8th Cir. 1994); United States v. Flippin, 924 F.2d 163 (9th Cir. 1991); (state) Martin v. State, 695 So.2d 141 (Ala.Cr.App. 1996); State v. Millan, 916 P.2d 1114 (Ariz.App.Div. 1995); Jackson v. State, 804 S.W.2d 735 (Ark. 1991); People v. Dibb, 43 Cal.Rptr.2d 823 (Cal.App. 5 Dist. 1995); People v. Hughes, 767 P.2d 1201 (Colo. 1989); State v. Gubitosi, 683 A.2d 419 (Conn.App. 1996); King v. State, 633 A.2d 370 (Del.Supr. 1993); Dickerson v. United States, 677 A.2d 509 (D.C.App. 1996); State v. Burns, 698 So.2d 1282 (Fla.App. 5 Dist. 1997); Taylor v. State, 491 S.E.2d 417 (Ga.App. 1997); State v. Ortiz, 683 P.2d 822 (Hawai'i 1984); People v. Mitchell, 650 N.E.2d 1014 (Ill. 1995); M. Stone v. State, 671 N.E.2d 499 (Ind.App. 1996); State v. Wonders, - P.2d -, 1998 WL 21843 (Kan. 1998); Pitman v. Commonwealth, 896 S.W.2d 19 (Ky.App. 1995); State v. Ratliff, 700 So.2d 213

plain-feel (or plain-touch) doctrine approved in Dickerson has not yet been applied in a reported case in Utah. Nevertheless, the test for justifying a plain-feel seizure is based on a well-settled principle.

B. Basis for Plain-Feel Seizure: Probable Cause Based on Totality of the Circumstances

The basis for a plain-feel seizure is that the item's contraband nature be "immediately apparent" from a pat-down. The Supreme Court equates this "immediately apparent" requirement with probable cause. Thus, to justify a seizure under the plain-feel doctrine, the officer must have probable cause to believe that the item felt during a pat-down search is contraband. Dickerson, 113 S.Ct. at 2137; Arizona v. Hicks, 107 S.Ct. 1149, 1153 (1987); Brown, 103 S.Ct. at 1542-1543 (plurality opinion).

(La.App. 4 Cir. 1997); Jones v. State, 682 A.2d 248 (Md. 1996); Commonwealth v. Lopez, 1996 WL 339948 (Mass.Super. 1996); People v. Taylor, 564 N.W.2d 24 (Mich. 1997); Matter of Welfare of G.M., 560 N.W.2d 687 (Minn. 1997); State v. Rushing, 935 S.W.2d 30 (Mo. 1996); State v. Stubbs, 892 P.2d 547 (Mont. 1995); State v. Craven, - N.W.2d -, 1997 WL 780883 (Neb. 1997); State v. Jackson, 648 A.2d 738 (N.J.Super.A.D. 1994); State v. Vasquez, 815 P.2d 659 (N.M.App. 1991); Matter of Gregory M., 627 N.E.2d 500 (N.Y. 1993); State v. Benjamin, 478 S.E.2d 651 (N.C.App. 1996); State v. Woods, 680 N.E.2d 729 (Ohio App.2 Dist. 1996); Scott v. State, 927 P.2d 1066 (Okla.Crim.App. 1996); State v. Slowikowski, 761 P.2d 1315 (Or. 1988); Commonwealth v. Fink, 700 A.2d 447 (Pa.Super. 1997); State v. Smith, 1998 WL 6442 (S.C.App. 1998); State v. Bridges, 1997 WL 804629 (Tenn. 1997); Williams v. State, 1997 WL 167871 (Tex.App.-Hous. 1 Dist. 1997); Ruffin v. Commonwealth, 409 S.E.2d 177 (Va. 1991); State v. Dempsey, 947 P.2d 265 (Wash.App. Div. 3 1997); State v. Greenwood, - N.W.-, 1997 WL 629853 (Wis.App. 1997); Perry v. State, 927 P.2d 1158 (Wyo. 1996).

It is well-settled that probable cause is determined by "a totality of the circumstances." United States v. Leon, 104 S.Ct. 3405, 3416-17 (1984); Illinois v. Gates, 103 S.Ct. 2317, 2332-33 (1983); State v. Yoder, 935 P.2d 534, 540 (Utah App. 1997); State v. Weaver, 817 P.2d 830, 832 (Utah App. 1991). It exists when the facts and circumstances within the knowledge of the seizing officer are sufficient to warrant a person "of reasonable caution" to believe that the item "may be contraband" or other evidence of a crime. Brown, 103 S.Ct. at 1543-1544 (plurality opinion); accord Dorsey, 731 P.2d at 1088 ("Probable cause exists where 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a [person] of reasonable caution in the belief that'" contraband or evidence of a crime will be found) (quoting Brinegar v. United States, 69 S. Ct. 1302, 1310-11 (1949)); see also Yoder, 935 P.2d at 540 ("probable cause means a 'fair probability that contraband or evidence of a crime will be found'" (quoting State v. Nguyen, 878 P.2d 1183, 1187 (Utah Ct. App. 1994) (citation omitted)).

The plain-feel doctrine is a logical and reasonable extension of Terry. In Dickerson, the Supreme Court noted that Terry itself had demonstrated that "the sense of touch is capable of revealing the nature of an object with sufficient reliability to support a seizure." Dickerson, 113 S.Ct. at 2137. The Court concluded that, "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." Id.

C. Probable Cause in Defendant's Case

The totality of circumstances here is sufficient to support a finding that the officer had probable cause to believe defendant was carrying drugs before he seized the film canister. The officer's reasonable suspicion that defendant was armed and dangerous had justified his pat-down search of defendant's bulging pocket (see Point I, above). Once the officer felt the large bulge and immediately recognized it as a film canister, an item commonly used to transport drugs, he had probable cause to seize it because:

1. The officer had observed defendant's participation in what appeared to a drug transaction in a location notorious for illegal drug sales (R. 76-78, 83, 90-91, 118).

2. When defendant and his companion saw the officers after the transaction, they began walking the other way (R. 78, 91).

3. Although an officer had seen currency change hands and Ballard put what defendant handed him into his *right* pocket, Ballard claimed defendant had only given him a small amount of change which he showed the officers after taking it from his *left* pocket (R. 78, 92).

4. Defendant denied three times having anything in his pocket, even though officers could see a large bulge (R. 79-80, 93, 119); see Yoder, 935 P.2d at 541-542 (responses by suspect which the officer knows to be false may well constitute probable cause when considered with prior suspicions).

5. After denying that he had anything in his bulging pocket, defendant began to reach into the pocket (R. 80).

6. During his pat-down search, the officer felt the bulge, and immediately recognized it as a film canister (R. 80-81), which the officer knew was commonly used to transport drugs. Id. (see n.13, below). See

Dorsey, 731 P.2d at 1088; Yoder, 935 P.2d at 540.

Although at this point the officer was justified in seizing the film canister, he chose not to. Instead, the officer once more asked defendant what he had in his pocket. Defendant still denied having anything in his pocket, and began, once again, to reach into the pocket.¹² At this point, the officer was more than justified in seizing the canister.

In sum, the totality of circumstances justified the warrantless seizure here.

D. Specific Case Authority Regarding Film Canisters and Probable Cause

Defendant cites a single case, Campbell v. Texas, 864 S.W.2d 223 (Texas 1993), in support of his proposal for a per se rule in Utah that a film canister is not contraband (see Def. Br. at 8). However, Campbell itself supports the totality of circumstances test in a case involving a film canister.

In Campbell, the officer made a traffic stop of Campbell's car after seeing it weaving between lanes. Upon approaching the stopped car, the officer smelled alcohol on Campbell's breath and observed a cup Campbell said had contained a "Bloody Mary." Campbell, 864 S.W.2d at 224. The court concluded that the officer had no

¹² It is clear that exigent circumstances also justified this warrantless seizure. Defendant was alerted and was reaching for the canister. See Davis v. State, 813 P.2d 1178 (Utah 1991) (fair reading of probable cause exception requires exigent circumstances for warrantless seizure); State v. Nguyen, 878 P.2d 1183, 1187 n.2 (Utah App. 1994) (best information available indicated that occupants were disposing of potential evidence from suspected crime).

reason to suspect Campbell was concealing contraband, and therefore the incriminating character of the film canister he felt during a consensual pat-down search was not "immediately apparent" and did not justify its seizure. Id. at 226. Contrary to defendant's assertions, Campbell does not support the proposition that a film canister can never be considered contraband. On the contrary, under the totality of circumstances in Campbell, the officer simply had no reason to suspect that Campbell was trying to conceal contraband.

In contrast, the officer here saw defendant in an apparent drug transaction. When questioned, it was clear defendant was trying to conceal something which appeared to be a weapon in his pants pocket. Given the totality of circumstances in defendant's case, the contraband nature of the film canister was immediately apparent after a pat-down search. Indeed, the distinctions between Campbell and defendant's case simply underscore the importance of the totality of circumstances in making a probable cause determination, and weigh against any per se rule.

The facts and circumstances in State v. Rushing, 935 S.W.2d 30 (Mo. 1996), cert. denied, 117 S.Ct. 1713 (1997) (addendum B), are much closer to those in defendant's case. In Rushing, an officer observed a car stopped in an area notorious for drug trafficking. As he watched, the officer saw Rushing participate in an apparent drug transaction with the driver of the stopped car. When later approached, Rushing denied any involvement. During a pat-down search, the officer felt a tubular item in

Rushing's front pants pocket. The officer immediately thought the item was a plastic "Life Saver Hole candy container, which is a common container used by crack dealers to carry their crack cocaine in." Rushing, 935 S.W.2d at 31-32 (recognizing also that medicine bottles, plastic baggies, and film canisters commonly contain drugs). The officer's belief was based on knowledge of the apparent drug transaction, the area they were in, and his previous training and experience. Id. at 31.

The officer removed the item from defendant's pocket, and found it to be a cylindrical plastic medicine bottle containing ten rocks of crack cocaine. Id. at 32-33. The Missouri Supreme Court found that the seizure was justified by probable cause based on "1) the officer's feel of the object, 2) his knowledge of the suspicious transaction observed by [another officer], 3) the reputation of the neighborhood as a drug trafficking area, and 4) his knowledge of commonly used containers." Id. at 33. The court specifically concluded that there was probable cause for the seizure even though the officer "felt the container rather than the cocaine itself. . . . [since] [t]he distinctive character of the container itself revealed its probable contents to the trained officer." Id.¹³

¹³ Utah and applicable federal precedent support the experience of the officers in Rushing, and in defendant's case, that film canisters are often used to carry drugs. See (Utah): State v. Maycock, 947 P.2d 695, 696 (Utah App. 1997) (film container held drug paraphernalia); State v. Mirquet, 844 P.2d 995, 996 (Utah App. 1992) (film canister used to transport cocaine), aff'd, 914 P.2d 1144 (Utah 1996); State v. Sterger, 808 P.2d 122, 123 (Utah App. 1991) (film canister contained marijuana); State v. Anderton, 668 P.2d 1258, 1259 (Utah 1983) (film canister contained marijuana);

In sum, it is clear that the contraband nature of a film canister (or any item), is not based solely on what may be its innocent use but on the totality of circumstances surrounding its detection during a pat-down search. See Commonwealth v. Burnside, 425 Pa.Super. 425, 430, 625 A.2d. 678, 681 (1993) ("while a particular type of container may have lawful purposes, the circumstances under which a trained narcotics detective views its use may be tantamount to a view of the actual contraband"). Based on the totality of circumstances in defendant's case, the contraband nature of the film canister was immediately apparent to the officer, and, therefore, its seizure was justified. See State v. Champion, 452 Mich. 92, 549 N.W.2d 849 (1996) (probable cause justified seizure where pill bottle immediately apparent after pat-down, and officer knew pill bottles often used to carry illegal drugs), cert. denied, 117 S.Ct. 747 (1997); see also Kansas v. Wonders, - P.2d -, 1998 WL 21843 (Kan. 1998) (probable

(federal): see Ohio v. Robinette, 117 S.Ct. 417, 419 (1996) (film container held controlled substance); United States v. Harris, 995 F.2d 1004, 1005 (10th Cir. 1993) (film canister contained six rocks of crack cocaine), cert. denied, 111 S.Ct. 197 (1990); United States v. Nicholson, 938 F.2d 983, 986 (10th Cir. 1993) (film canister contained heroin); United States v. Pettit, 903 F.2d 1336 (10th Cir. 1990) (film canisters contained twenty-one baggies of crack cocaine); United States v. Hanks, 821 F.Supp. 1425, 1427 (D. Kansas 1993) (film canister contained marijuana), appeal dismissed, 24 F.3d 1235 (10th Cir. 1994); United States v. Gilmer, 793 F.Supp. 1545, 1548 (D. Colorado 1992) (film canister contained crack cocaine).

Appellate decisions from other states also corroborate the officers' experience. See, e.g., State v. Anderson, 259 Kan. 16, 17, 910 P.2d 180, 181 (Kansas 1996) (officer knew film container often used to transport illicit drugs); State v. Walker, 93 N.M. 769, 770, 605 P.2d 1168, 1169 (N.M. Ct. App. 1980) (film container contained marijuana residue).

cause justified seizure where, after pat-down, immediately apparent to officer that bulge in pocket was bag of marijuana); In the Interest of B.C., 453 Pa.Super. 294, 683 A.2d 919 (1996) (probable cause justified seizure where officers observed apparent drug transaction and bag of marijuana immediately apparent to officer after pat-down); State v. Trine, 236 Conn. 216, 673 A.2d 1098 (1996) (probable cause justified seizure where rock cocaine in baggie in pants pocket immediately apparent to officer during pat-down).¹⁴


¹⁴ Because defendant does not challenge the lawfulness of his warrantless arrest, the seizure and opening of the film canister may also be justified on alternative grounds: as a search incident to arrest. Based on the totality of circumstances, the officer had probable cause to arrest after he identified the film canister in defendant's pocket during the pat-down search. See Utah Code Ann. § 77-7-2 (1986) (warrantless arrest authorized where, among other reasons, offense committed in presence of officer and reasonable cause to believe arrestee may destroy or conceal evidence or injure another person); Chimel v. California, 89 S.Ct. 2034, 2039-2040, reh. denied, 90 S.Ct. 36 (1969) (warrantless arrest and full search of arrestee for weapons and contraband authorized where probable cause); Rawlings v. Kentucky, 100 S.Ct. 2556, 2564-2565 (1980) (even if search and seizure chronologically precede a formal arrest, they may be constitutionally valid as long as arrest and search and seizure are substantially contemporaneous and are integral parts of same incident); accord State v. Banks, 720 P.2d 1380 (Utah 1986) (regardless of when Banks arrested, search and discovery of drug were clearly preceded by probable cause for his arrest and were therefore valid); see also People v. Dibb, 37 Cal.App.4th 832, 835 (1995) (where officer had probable cause to arrest based in part on results of pat-down search, search of object authorized as search incident to arrest); State v. Trine, 236 Conn. 216, 238, 673 A.2d 1098, 1111 (1996) (seizure of cocaine from pocket permissible because officer had probable cause to arrest Trine); State v. Champion, 452 Mich. 92, 115-117, 549 N.W.2d 849, 860-862 (1996) (search of pill bottle before formal arrest qualifies as search incident to arrest if probable cause for arrest existed before bottle searched).

CONCLUSION

Defendant's conviction and sentence should be affirmed.

RESPECTFULLY submitted this 27th day of February, 1998.

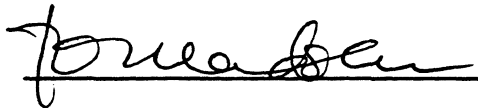
JAN GRAHAM
Attorney General


BARNARD N. MADSEN
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that four copies of the foregoing Brief of Appellee were mailed
by first class mail this 27th day of February, 1998 to:

James M. Retallick
2564 Washington Boulevard
Ogden, Utah 84401



Addendum A

**(Evidence from the preliminary hearing, R. 75-96;
the parties' arguments on the motion, R. 97-116;
and the trial court's oral ruling, R. 116-120)**

1 THE COURT: This is the time set for Preliminary
2 Hearing. Is the State ready?

3 MR. PARMLEY: Yes, your Honor.

4 THE COURT: Mr. Gravis, is the defense ready?

5 MR. GRAVIS: Yes, your Honor, although, your Honor,
6 I believe we do need an interpreter for my client.

7 (Colloquy waiting for interpreter.)

8 MR. GRAVIS: While we are waiting, I will invoke the
9 exclusionary rule.

10 THE COURT: All right. How many witnesses?

11 MR. PARMLEY: We will call Officer Hall this
12 morning. Officer Clark is with him.

13 THE COURT: All right. Officer Clark, if you will
14 step outside, please. Do not discuss your testimony with
15 anyone. If you are chosen to testify, you will be asked to
16 come back in. Thank you sir.

17 (Interpreter sworn.)

18 THE COURT: Very well. With that, Mr. Parmley, is
19 there an opening statement from the State?

20 MR. PARMLEY: No. Mr. Gravis has agreed for
21 purposes of this hearing to stipulate that the substance was
22 cocaine.

23 THE COURT: Is that correct, Mr. Gravis?

24 MR. GRAVIS: A witness would testify that it tested
25 positive for cocaine, only for purposes of this hearing.

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THE COURT: That's correct.

MR. PARMLEY: We will call Officer Hall.

THE COURT: All right. The Court will accept the stipulation for purposes of this hearing. And, Officer Hall, if you will raise your right hand and be sworn, please.

NORMAN HALL

called as a witness, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PARMLEY:

Q Tell us your name, please, and your occupation.

A Norman Hall, Police Officer for Ogden City Police Department.

Q Were you on duty April 17th about 5:00 p.m.?

A Yes, I was.

Q Was that in the area of 25th Street and Lincoln?

A Yes.

Q What were you doing at that location, Officer Hall?

A Officer Clark and I were patrolling that area, going down the sidewalks on our police bikes.

Q Would you tell us what, if anything, unusual you observed at that time?

A We observed the Defendant and another Hispanic had stopped to talk to two white male individuals in front of the Marion Hotel. We had been watching this area carefully

1 because we had been getting word from the Marion Hotel manager
2 and several people on the street that transient type Hispanics
3 were selling narcotics on the street.

4 As we watched them, they stopped and talked. I saw the
5 Defendant take something out of his right pocket and hand it
6 to the right hand of--I later identified the white guy was Mr.
7 Ballard. Whatever it was.

8 Q What was it about this exchange that drew your
9 attention to it? What was there about this that caught your
10 eye?

11 A Well, we saw some money in one hand change hands.
12 We didn't know what the object was. What they handed, Mr.
13 Ballard shoved into his pocket. To me, it looked like a drug
14 buy.

15 Q Did you see both the money and some other object?

16 A I didn't see the object they passed. I saw the
17 money they passed.

18 Q Okay. Did you see hands exchanging something other
19 than the money?

20 A Right, I saw hands exchanging. And whatever he
21 handed Mr. Ballard, he put it in his pocket.

22 Q All right. So you saw money actually change hands.
23 And you saw something else exchanged?

24 A Yeah, right. We were just crossing Lincoln when
25 they made the exchange.

1 Q All right. And Mr. Ballard you said put something
2 in his pocket?

3 A Correct.

4 Q Appeared to put something in his pocket. You said
5 just a minute ago that that appeared consistent with what you
6 observed with drug exchanges in this area?

7 A Yeah, I made several drug arrests on 25th Street in
8 the parking lots where the exchange has been made and sold
9 there. I probably made over a hundred just right from in that
10 area the last couple of years.

11 Q What did you do after you had seen that?

12 A Well, the Defendant and his friend walked--they
13 were--they talked. They conversed. They looked at us, and
14 they walked off westbound. Mr. Ballard and another gentleman
15 stood there. We stopped and talked to Mr. Ballard first.

16 And Mr. Ballard explained Mr. Hernandez just owed him
17 some money from St. Anne's. He had stayed at St. Anne's and
18 he owed him a dollar. And he pulled some money out. But he
19 didn't pull it out of the right pocket. He pulled it out of
20 the left pocket, and pulled out some change.

21 Q Now, which pocket was it on Mr. Ballard where you
22 had seen him take whatever it was that Mr. Hernandez had
23 handed him?

24 A It went into his right pocket.

25 Q All right.

1 A The money he pulled out, Mr. Ballard pulled out, was
2 out of his left pocket.

3 Q What did you do then at that point, Officer?

4 A Jeff and I talked to Mr. Ballard for a minute. It
5 was obvious that, you know, we didn't know what--for sure--I
6 mean I was pretty--I thought maybe it was a drug deal. I
7 couldn't prove anything. He said let's go down and see if the
8 two Hispanic gentlemen will talk to us or not.

9 Q All right. How did you go about that?

10 A We went down. They were waiting for the light to
11 cross Wall. So we got off our bikes and asked if we could
12 talk to him. I asked the Defendant do you mind if we talk to
13 you.

14 Q Tell us exactly how you approached them.

15 A We got off our bikes and went up to them. They were
16 standing there. Actually, they weren't facing Wall. They
17 were facing south. I said do you mind if we talk to you about
18 your money transaction with your friends up the street? He
19 just shrugged his head and said sure.

20 I asked him do you have any weapons or do you have any
21 I.D. on you? He said no, he didn't have any weapons. He
22 started pulling everything out of his pants pockets. He
23 pulled some change out, pulled his wallet out of his left rear
24 pocket. Pulled some toilet tissue out of his left front
25 pocket. But I could still see a bulge in his left front

1 pocket. I asked him what else he had in his pocket. He said
2 nothing. I said I could still see something in your pocket.
3 You have a pretty good bulge in your pocket. And he said I
4 have nothing else in my pocket.

5 Q Had he given you identification at that time?

6 A No, he was just holding everything in his hands.

7 Q All right.

8 A And at that time he hadn't given me his wallet. He
9 was holding a bunch of stuff, his change and his wallet and
10 stuff. But he hadn't given me anything yet.

11 Q All right.

12 A And then I asked him again what do you have in your
13 pocket. And he said nothing. He had a wadded up toilet paper
14 that he shoved back into his left pocket. I think he was
15 trying to hide what was in his left pocket at that time. I
16 could still see the big round bulge in it. So I just--on the
17 outside of the pocket, I reached and grabbed to feel what it
18 was.

19 Q And why did you do that at that time?

20 A To see if it was a weapon. To make sure what he had
21 in his pocket.

22 Q And when you felt the bulge, did you recognize what
23 it may be?

24 A Yeah, I recognized it. It was a plastic--

25 Q How is it you recognized it?

1 A Well, I have taken a lot of plastic film canisters
2 off of a lot of other people who deal in narcotics. Plus I
3 have a lot of them myself because I shoot a lot of film
4 myself. I know what a plastic film canister is. I have a lot
5 of them.

6 Q What is your experience with film canisters and
7 narcotics?

8 A I would say probably at least 95 percent of the time
9 if I find a film canister, it is either empty or got residue
10 in it, or it has got some narcotics in it.

11 Q What did you do when you felt that bulge and
12 recognized it as a film canister?

13 A I asked him again what he had in his pocket. He
14 said nothing. He reached in his hand. I thought--it looked
15 like to me he was going to take the lid off. I know there was
16 a lid, I could feel the lid. You could feel the outside of
17 the lid on the top of the thing. I reached down in the pocket
18 down towards past the toilet paper and I just reached in and
19 finally took it out of his pocket.

20 Q You reached in and took it?

21 A I reached in and took it out of his pocket.

22 Q And what did you discover when you removed it from
23 his pocket?

24 A I opened the lid, and there were eight individually
25 wrapped packages of white powdery substance. What they do is

1 they cut a round piece of plastic out, put the cocaine in it,
2 twist it, and seal it with something hot. They seal the
3 plastic so it is wrapped.

4 Q Did each of the eight contain the white powdery
5 substance?

6 A Yes, it did.

7 Q Have you seen in your experience--

8 MR. GRAVIS: Your Honor, for purposes of Preliminary
9 Hearing I will stipulate in his experience he has seen drugs
10 packaged like that. And he won't have to testify to that.

11 THE COURT: Are you willing to accept that
12 stipulation, counsel?

13 MR. PARMLEY: Basically what I wanted was his
14 opinion individually packaged in that manner is consistent in
15 his opinion with distribution.

16 THE COURT: Okay. Are you willing to accept that
17 stipulation?

18 MR. GRAVIS: For purposes of Preliminary Hearing,
19 yes.

20 THE COURT: very well. The Court will accept the
21 stipulation also.

22 MR. PARMLEY: Then that's all we have.

23 THE COURT: Okay. Cross.

24 CROSS-EXAMINATION

25 BY MR. GRAVIS:

1 Q Yeah. You said you observed the transaction taking
2 place. You were--where at on Lincoln--where were you at when
3 you first observed it, the man was talking to Mr. Ballard?

4 A We had just passed the Kokomo westbound.

5 Q Okay. So you were what, two or three hundred feet
6 away?

7 A No, not even a hundred feet.

8 Q Okay. Now you and Officer Clark had received
9 reports that Hispanics or illegals were dealing drugs,
10 correct?

11 A That's correct.

12 Q What physical description did you get?

13 A Just transient type looking Hispanic males.

14 Q How many transient type that look exactly the same
15 do you routinely see on 25th Street in the area of Lincoln?

16 A We see several.

17 Q Several, okay. So there was no--nothing particular
18 about Mr. Hernandez, other than he was Hispanic, looked like a
19 Hispanic male. You see him. You see him talking to Mr.
20 Ballard.

21 Now at that point in time all you see is him reaching in
22 his pocket, take something out and handing it to Mr. Ballard,
23 correct?

24 A Yeah. Well, he is handing something. Mr. Ballard
25 is also handing something. And Ballard is handing him money.

1 Q Now you say Ballard is handing him money?
2 A I wasn't sure. I could see the money in their hand.
3 Q Well, you saw--whose hand did you see the money in?
4 A Ballard's hand.
5 Q Okay, Ballard stuck his hand--what kind of money did
6 you see?
7 A I saw green. To me it is bills. All Ballard showed
8 me was change.
9 Q Now you went back and talked to Ballard again later,
10 correct?
11 A Jeff Clark did. I didn't.
12 Q Okay, you didn't.
13 A I didn't talk to him.
14 Q Did you ever find any bills on Mr. Ballard?
15 A I didn't talk to--
16 Q Okay.
17 A Mr. Ballard.
18 Q When you talked to Mr. Ballard the first time, he
19 said Mr. Hernandez owed him some money, and owed him a dollar.
20 But he only had fifty cents, and gave him fifty cents, right?
21 A That's what he said the first time, right.
22 Q Also in your report you said he pulled the money out
23 of his pocket. In fact in your report you didn't say which--
24 what--in your report you didn't say which pocket you saw Mr.
25 Ballard put the money in, is that correct?

1 A I didn't, no, not in my report. I know he put it in
2 his left pocket. That's where he pulled it out of with his
3 left hand. He pulled it out of the left pocket, the change.

4 Q Where did he put the money Mr. Hernandez gave him?
5 How do you know he put it in his right pocket instead of his
6 left pocket.

7 A Whatever he handed Mr. Ballard was--we didn't see.
8 It was too small to see what he handed Mr. Ballard. I didn't
9 see any money--what the object was Mr. Ballard put in his
10 right pocket..

11 Q Okay. Now at that point do you stop and talk to Mr.
12 Ballard, or just Officer Clark?

13 A Clark did. I was just a side bailer. I was beside
14 Jeff. I was on the left of Jeff. Jeff was at his bike. He
15 was talking to Ballard.

16 Q So you were there at that time. You heard what Mr.
17 Ballard had to say?

18 A Yeah.

19 Q So you went up and talked to Mr. Hernandez, correct?

20 A That's correct.

21 Q And he pulled a lot of items out of his pocket,
22 correct? And you still saw something in his pants pocket.
23 What did it look like when you saw it, the bulge in his
24 pocket?

25 A Something big and round.

1 Q Something big and round. How big?

2 A Oh, it was pretty good--I don't know, whatever--

3 this big around, sticking up, bulging out of his pocket. I

4 can't--

5 Q What kind of pants did he have on?

6 A These tan, like a tan--they are big, bulky type

7 pants. But they were tan pants.

8 Q So was it tight or loose on him?

9 A It was loose.

10 Q And you talked--and those pants are over in the--I

11 imagine that's what he was wearing when he was booked into

12 jail?

13 A Pardon me?

14 Q That's what he was wearing when he was booked into

15 jail?

16 A That's correct.

17 Q Okay. You saw this bulge. How big a bulge was it?

18 Was the pants fitting tightly or loosely?

19 A No, they were loose. They were loose. They were

20 loose pants. Probably a lot baggier than yours. And big,

21 bulky, baggie pockets. I mean you could still see a bulge in

22 it. To me it would have to be pretty big.

23 Q Now, a film canister is about an inch and a half

24 long and about, oh, three quarters to an inch in diameter?

25 A No, they are bigger than that. Probably about, oh,

1 an inch and three quarters in diameter. Probably two or three
2 inches long, some of them.

3 Q What size of film canister was this? Was it 35
4 millimeter?

5 A It was 35 millimeter. It wasn't like a--it is more
6 like a Kodak film canister. If you get Fuji film, there is
7 these really small white ones.

8 Q Are these black?

9 A This is a big gray, black type.

10 Q Black type. Do you have it with you?

11 A Pardon?

12 Q Do you have it with you, the film canister? Do you
13 have it?

14 A Do I have it with me?

15 Q Yes.

16 A No.

17 THE COURT: Would this help, Mr. Gravis?

18 MR. GRAVIS: Well, that's not the same size either.

19 Q You said you could see this bulge?

20 A Right.

21 Q And what exactly did the bulge appear to be?

22 A Something round. And you know, fairly long. I mean
23 I don't know if I am looking at the end of it or side, or
24 what.

25 Q You say fairly long. How long did it appear to be?

1 A Probably--well, looking, I think I was looking at
2 head. The cap of it was sticking out.

3 Q Explain when you said it was sticking out, where was
4 it sticking out?

5 A Well, you could see it was the round part of the cap
6 sticking out.

7 Q But you couldn't--

8 A Twisted in there or what.

9 Q Twisted this way?

10 A It wasn't twisted this way, but sideways. You could
11 see something round like this.

12 Q Okay. Did you have any idea what that could be?

13 A Did I? No, not until I grabbed it and felt it.

14 Q But what did it appear to be before you grabbed it
15 and felt it?

16 A Could have been a gun as far as I know. It could
17 have been a small caliber gun, with a pair of pants like that.

18 Q Did you have any reason to believe Mr. Hernandez had
19 a gun?

20 A Well, if I believed--I thought it was a drug deal. A
21 lot of narcotics buys, and people using and selling are
22 carrying weapons. That's why I--

23 Q Actually, did you believe Mr. Hernandez had a gun
24 when you saw that bulge?

25 A Yeah, I thought possibly it might be a gun.

1 Q You thought possibly it might be a gun, okay.

2 MR. GRAVIS: I have nothing further.

3 THE COURT: Redirect?

4 MR. PARMLEY: No other questions, your Honor.

5 THE COURT: You may stand down, Officer Hall. Thank
6 you. Is there a stipulation as to this person's identity?

7 MR. PARMLEY: There is not. I can--

8 THE COURT: We got carried away with the
9 stipulations, and I didn't know if that was at issue or not.

10 MR. GRAVIS: I will stipulate to the identification,
11 this is the same person.

12 THE COURT: For purposes of the Prelim?

13 MR. GRAVIS: Yes.

14 THE COURT: You will accept that?

15 MR. PARMLEY: Yes.

16 THE COURT: Okay. Anything else, Mr. Parmley?

17 MR. PARMLEY: No, your Honor.

18 MR. GRAVIS: Call Officer Clark.

19 THE COURT: Okay.

20 MR. PARMLEY: Can Officer Hall stay where he is the
21 primary officer in this case?

22 MR. GRAVIS: I have no objection.

23 THE COURT: You can stay.

24 JEFF CLARK

25 called as a witness, and having been first duly sworn, was

1 examined and testified as follows:

2 DIRECT EXAMINATION

3 BY MR. GRAVIS:

4 Q State your full name for the record.

5 Q Jeff Clark, Ogden City Police Officer.

6 Q And drawing your attention to the 17th of April this
7 year, were you so employed?

8 A Yes, I was.

9 Q And drawing your attention to approximately I
10 believe it is 5:00 o'clock that day, were you on duty?

11 A Yes, I was.

12 Q And where were you at?

13 A 25th and Lincoln.

14 Q Okay. Where--now when you first saw the Defendant,
15 exactly where were you at?

16 A I was on my bike crossing the intersection of 25th
17 and Lincoln.

18 Q All right, crossing the intersection of 25th and
19 Lincoln. And what did you observe?

20 A I saw several white males standing against the
21 Marion Hotel along the sidewalk on the south side in the 100
22 block. I saw two Hispanic males, transient type, walking
23 westbound in front of the Marion on the south side in the 100
24 block.

25 Q Okay. What did you see--what did you observe after

1 that?

2 A I saw one of the white males standing against the
3 Marion take his back off the Marion and step towards the two
4 Hispanic transient type walking westbound. The Hispanic
5 wearing the plaid flannel, which would be Sergio Hernandez,
6 was the closest to the individual standing against the wall.
7 The individual standing against the wall reached out as if he
8 was talking to the suspect Hernandez. And Hernandez put his
9 hand quickly into his pocket. He pulled it out and handed him
10 something. The male standing against the Marion took it,
11 grasped it, put it in his pocket. And Hernandez and the other
12 Hispanic transient type continued westbound on 25th Street.

13 Q Could you tell what the item was?

14 A No. Small enough that it could be concealed within
15 the palm of a hand.

16 Q Okay. It was concealed within the palm of the hand?

17 A Yes.

18 Q You couldn't see what it was?

19 A No.

20 Q Okay. Did you see Mr. Ballard hand the Defendant
21 anything?

22 A Excuse me?

23 Q Did you see Mr. Ballard hand the Defendant anything?

24 A At that time, I wasn't sure who was handing who
25 what.

1 Q So you just saw one exchange. You didn't see two
2 exchanges?

3 A Right.

4 Q Okay. Then what did you do?

5 A Myself and Officer Hall, we rode up to Mr. Ballard,
6 who was the individual that we identified that stepped out and
7 exchanged with Mr. Hernandez, and stopped and asked him do you
8 know this person. He said yes, I know him from St. Anne's.
9 We both live down there. We said what changed hands? He said
10 Mr. Hernandez owed me money. We said how much? He said a
11 dollar. I asked him if I could have my dollar back.
12 Hernandez said he didn't have the dollar, I only have
13 approximately fifty cents in change. And that's what
14 Hernandez gave me. And standing there talking to him--

15 Q Now, what pocket did you see Mr. Ballard put the
16 money--put the object in that Mr. Hernandez gave him?

17 A I wasn't in a position to see clearly. I was
18 against the building, probably almost in a direct line of Mr.
19 Ballard. Like I said, there were several other individuals
20 standing against the side of the building also. I am not sure
21 exactly, exactly which hand.

22 Q Okay. Did you ask Mr. Ballard--did Mr. Ballard show
23 you any money?

24 A Yeah, he reached into his pocket and pulled out a
25 handful of change, which appeared to be more than fifty cents.

1 Q Okay. What pocket did he pull that out of?
2 A Let's see, it would be his right side.
3 Q Pulled it out of his right pocket?
4 A I am not sure. I am just--
5 Q Which pocket--which pocket do people normally carry
6 change money in?
7 A I normally carry it in my right pocket because I am
8 right handed.
9 Q Did you have an opportunity to talk to Mr. Ballard
10 again later?
11 A Yes.
12 Q Did he show you any money out of any different
13 pocket?
14 A No. That was all the money in his pockets.
15 Q Okay.
16 A On his person, in that pocket.
17 Q Okay. Now after you talked to Mr. Ballard, did you
18 go with Officer Hall when you stopped the Defendant?
19 A Yes.
20 Q Okay. And you stopped the Defendant and the
21 Defendant pulled various items out of his pocket, is that
22 correct?
23 A That's correct.
24 Q And after he had pulled those items out of his
25 pocket what did you see, if anything?

1 A First of all, I couldn't see his pocket. Like I
2 described, he had a black and white, large, oversized flannel
3 shirt over a T-shirt. And that covered his waist and his
4 pockets.

5 Q Okay. So after he pulled everything out of his
6 pockets, could you see his pockets?

7 A Yeah, once the items starting coming out, I did see
8 a large bulge in one of his pockets.

9 Q And what did that bulge appear to be?

10 A He pulled out a large wad of tissue paper. And
11 while holding that tissue paper, he still had another large
12 bulge in his pocket.

13 Q What did that bulge appear to be?

14 A It was a large round container, canister type.

15 Q What's what it appeared to be when you were looking
16 at his pockets?

17 A Yes. That's the only thing I could think that it
18 would look like for sure. Round.

19 Q Okay. So it appeared to be a canister type
20 something, is that correct?

21 A Right.

22 Q Didn't appear to be a weapon?

23 A All I can say, it was large, round. I don't know
24 whether it was a canister or weapon. I couldn't tell.

25 Q It appeared to be a canister in your mind, right?

1 A No, not for sure. The reason why I say canister is
2 because when he was patted down and I touched it, that's what
3 it felt like.

4 Q Okay. That was a film canister, right?

5 A Once it was pulled out of the pocket, right.

6 Q Do you ever carry film canisters around with you?

7 A No, I don't.

8 Q Nothing illegal about carrying a film canister,
9 right ?

10 A Commonly it is carried by people that possess
11 narcotics and transport them.

12 Q Also carried by people who take pictures, right?

13 A Sure.

14 MR. GRAVIS: Okay. I have nothing further.

15 MR. PARMLEY: No other questions.

16 THE COURT: You may stand down, Officer, thank you.
17 Any other witnesses, Mr. Gravis?

18 MR. GRAVIS: No, your Honor. We will submit it.

19 THE COURT: All right. Mr. Parmley?

20 All right. Would you please explain to Mr. Hernandez, at
21 least based on what I have heard, while there may be other
22 issues that can be addressed, I am satisfied there is
23 sufficient probable cause to order him held for trial on the
24 matter.

25 I assume, counsel, you will go back and get a date from

1 Judge Dutson. And if you need to file any kind of Motions--

2 MR. GRAVIS: Yes, I would just let the Clerk know I
3 will be wanting a copy of the transcript of this hearing.

4 THE COURT: Okay, you will make a copy of the tape
5 for the Public Defender's office. I assume either Melissa or
6 Heather will be over to take that up.

7 Anything else? The State want a copy?

8 MR. PARMLEY: (Inaudible.)

9 All right. With that then, this matter will be
10 adjourned. And if you will take it back, Judge Dutson will be
11 able to get it on--do you want to go ahead with the
12 arraignment, or do it all before Judge Dutson?

13 MR. GRAVIS: Do it all in front of Judge Dutson.

14 THE COURT: Very well. Deputy, if you will take the
15 original file back down, they will need that.

1 THE COURT: Mr. Gravis, this is your Motion. You
2 may proceed. Is the Defendant here?

3 THE CLERK: For the record, State vs. Sergio
4 Hernandez, case number 971900515.

5 MR. GRAVIS: Your Honor, it is my Motion, but it is
6 the State's burden. They have the burden to prove by a
7 preponderance of the evidence that the search was legal.

8 THE COURT: Do you want them to proceed first?

9 MR. GRAVIS: Yes, your Honor.

10 THE COURT: All right, then the State may proceed.

11 MR. PARMLEY: Your Honor, we have broken our
12 arguments into three parts as outlined in our brief opposing
13 the Defendant's Motion to Suppress.

14 THE COURT: Before we get into that, does either
15 party anticipate calling any witnesses, presenting any
16 additional evidence, or do you intend to submit--the Court has
17 reviewed the file in this matter and has heard the case of the
18 Preliminary Hearing as it relates to the testimony of Officer
19 Hall and Officer Clark, I believe. And that tape then has
20 been given to the Clerk, that I listened to.

21 Go ahead and proceed then.

22 MR. PARMLEY: Your Honor, we have broken this into
23 three parts. First of all, the initial stop itself we say was
24 justified. Really, we view the initial stop as more of a
25 police officer-citizen encounter, rather than a level one

1 stop. Officer Hall said he approached the Defendant and said
2 excuse me, sir, can we approach you and talk to you about what
3 happened back there on the street? The Defendant said sure.

4 Even if it went beyond the police-citizen encounter, the
5 officer had reasonable suspicion under 77-17-15, and under
6 Terry vs. Ohio, a peace officer may stop any person in a
7 public place when he has reasonable suspicion to believe he
8 has committed, or is in the act of committing, or is
9 attempting to commit, a public offense. And may demand his
10 name, address and an explanation of his actions.

11 Officer Hall has articulated very well that when he
12 observed these two, he saw that--the green of money changing
13 hands, and also saw the stuff that the subject hands something
14 to the one male standing next to the wall of the Marion. And
15 saw that male then with that object in the palm of his hand
16 reach down and put it into his right pocket.

17 He immediately recognized that as having all the
18 appearances of what he observed as a drug transaction. Two
19 people meet on the street very briefly. That money changes
20 hands. Something else changed hands. And then he saw the one
21 male put that into his pocket. He recognized that as what he
22 believed to be a drug transaction. I think he articulated
23 very well and reasonably why he believed that was a drug
24 transaction.

25 But he gathered additional facts before he even stopped

1 and talked to the Defendant. He approached Mr. Ballard and
2 talked to him about what had happened. And Mr. Ballard at
3 that time said, well he owed me about--he gave me fifty cents.
4 They asked Mr. Ballard to show them the money. He pulled
5 fifty cents out of his left pocket according to Officer Hall.
6 And Officer Clark wasn't able to articulate that, he said he
7 wasn't in a position he saw which pocket it was. But Officer
8 Hall did articulate that, and knew that the object that he was
9 concerned about, what he reasonable believed was the fruit of
10 the drug transaction, had been put into Mr. Bauer's right
11 pocket.

12 So based upon that and the exchange he observed, he
13 stopped and talked to the suspect, Mr. Hernandez.

14 Now, the second part was he was checked for
15 Identification. Asked if he had any weapons. The Defendant
16 was cooperative. Started emptying his pockets at that point.
17 But Officer Hall then sees remaining in the Defendant's pocket
18 a bulge. He sees a cylindrical round shape bulging up there
19 in the pocket. The Defendant was wearing baggie pants. It is
20 apparent that he has got something in his pocket. The
21 Defendant denied there is anything else in his pocket, yet
22 Officer Hall could see there was something remaining in the
23 pockets.

24 Not only that, Officer Hall had seen what he interpreted
25 as a drug transaction. And in his experience people who are

1 involved with narcotics often carry weapons. Given that, and
2 the Defendant's denial there was anything else in his pockets,
3 Officer Hall reasonably believed that the Defendant may be
4 armed. And may pose a threat to the officer's safety, or
5 others. And then a pat down for weapons. And during the pat
6 down for weapons, he feels not a gun, but he feels what he
7 immediately recognizes as a film canister.

8 The pat down leading to that discovery was reasonable and
9 justified under the law under Terry versus Ohio and the Utah
10 Code 77-7-16, which reads a peace officer who has stopped a
11 person temporarily for questioning may frisk the person for
12 dangerous weapons if he reasonably believes he or any other
13 person is in danger.

14 Now, that takes us to part three where Officer Hall then
15 reaches into the suspect's pocket to remove the film canister.
16 Was that constitutionally permissible?

17 The main authority on this is a United States Supreme
18 Court case called Minnesota vs. Dickerson that articulated
19 what the Court calls the plain feel doctrine. And in that
20 case, the Court reasons that if the peace officer lawfully
21 pats down a suspect's outer clothing and feels an object whose
22 contour or mass makes the identity immediately apparent, and
23 there has been no invasion of the suspect's privacy beyond
24 that already authorized by the pat down for weapons, and if
25 the object is contraband, the warrantless seizure is justified.

1 In this case Officer Hall, in patting down the suspect,
2 immediately recognizes the identity of this object as a film
3 canister. This is something which he has had a lot of
4 experience with. He knows what a film canister feels like.
5 But beyond that, Officer Hall knows from his experience that
6 film canisters are very, very often used by people who use
7 narcotics to contain their controlled substance.

8 A similar case to the case of Minnesota vs. Dickerson was
9 State vs. Rushing. This is simply persuasive authority, I
10 suppose. It is the Supreme Court of Missouri. And in that
11 case--which is very, very similar to the case before this
12 Court. The Officer had reason to believe that the drug
13 transaction may have occurred. He had done a pat down and
14 recognized what they called a candy container, a lifesaver
15 hold--or candy container, or something like that. And he
16 removed that. The Court in State vs. Rushing said Lifesaver
17 candy containers, plastic baggies, film canisters and other
18 types of containers that are easily concealed in a pockets and
19 are easily openable for removal of items, that it is
20 immediately apparent in that case as a candy container and
21 knowing that drugs are often stored in such candy containers,
22 combined with the officer's knowledge of suspicious
23 transactions, there was probable cause for the seizure of the
24 item from the suspect's pocket.

25 Now, it is not always going to be a film canister,

1 obviously. Sometimes it is going to be a baggie. Sometimes
2 it is going to be a paper bindle. In just about any case that
3 you can imagine where the officer feels something that he
4 recognizes as a bindle or baggie or a film canister, there
5 could be the argument made that this could possibly be
6 carrying something legitimate. Just as in this case, a film
7 canister could be perfectly lawfully used to carry film. A
8 baggie could be perfectly lawful and used to carry--or simply
9 in a person's pocket. Or something that has the feel of a
10 baggie, and yet be a perfectly lawful item. A candy dispenser
11 may be perfectly lawful. But that doesn't mean that an
12 officer who is able to identify the item by his touch through
13 the clothing, and who has reason to believe that a drug
14 transaction has occurred, doesn't have probable cause to take
15 that item from the pocket. He does, coupled with all those
16 other things, even though there may be a legitimate
17 explanation for somebody having that item in their pocket.

18 In this case that's exactly what Officer Hall has
19 articulated, that he saw all the indices of a drug transaction
20 on the street. The Defendant was denying there was anything
21 remaining in the pocket, even when it was readily apparent to
22 Officer Hall there was something there. So the indices of a
23 drug transaction, the Defendant's denial that there was
24 anything else in his pocket, the claim that he had removed
25 everything from his pocket, and then Officer Hall immediately

1 recognizing the film canister. And knowing that in the
2 hundreds of arrests he does a film canister, 95 percent of the
3 time I believe he said, he discovered do not contain film.
4 But are either empty, contain a residue or a controlled
5 substance. That certainly gave him probable cause under the
6 authority of Minnesota vs. Dickerson to reach into the
7 Defendant's pocket at that time and remove it.

8 We believe that the stop, the pat down, and the intrusion
9 and the removing of the film canister were all lawful under
10 the constitution of the United States and the State of Utah.
11 And ask the Court in this case to deny the Defendant's Motion
12 to suppress.

13 Thank you.

14 MR. GRAVIS: It is our position that the detention
15 is not based upon reasonable suspicion. The officer--Officer
16 Hall went up and asked him if he could talk to him about what
17 happened. That may be consensual. That may be a level one
18 consensual police-citizen action. But at the point of time he
19 starts doing the frisk, that becomes a level two stop which
20 requires reasonable suspicion the Defendant is engaged in
21 criminal activity.

22 You have heard the testimony of both officer Hall and
23 Officer Clark as to what they observed. And there is some
24 discrepancy as to what they observed, particularly whether Mr.
25 Bauer passed anything to the Defendant. I think one of the

1 most telling things there is the description of what they are
2 looking for. A transient looking Hispanic male, which there
3 is a lot of Hispanic males on 25th Street on any given day.
4 That's what they are looking for.

5 More importantly when they talk to Mr. Ballard, if they
6 have a reasonable suspicion a drug transaction had just
7 occurred, they didn't pat him down. They asked him what
8 happened. He pulled the money out of his pocket. Officer
9 Hall said well it isn't the same pocket. But they didn't go
10 go pat him down.

11 Officer Hall says people engaged in drug activity,
12 possession or sales, routinely are armed, and therefore that
13 gives him grounds to frisk people who he believes are engaged
14 in drug transactions. He didn't pat Mr. Ballard down. So I
15 submit he didn't have reasonable suspicion. If he had had
16 reasonable suspicion, he would have patted Mr. Ballard down.

17 He patted Mr. Hernandez down because he was a Hispanic
18 male. And whatever a transient looking Hispanic male is, he
19 decided he was.

20 More importantly, the other item is the pat down has to
21 be based upon a reasonable suspicion the Defendant is
22 presently armed and dangerous and presents a threat to the
23 officer or to another. I submit if the officer allowed the
24 Defendant to reach in his pockets and pull items out of his
25 pocket, he did not reasonably believe he was armed and

1 dangerous and presented a danger to the Officer or others. He
2 allowed Mr. Hernandez to reach in his pocket. So when he saw
3 the bulge in there, if he was worried it was a weapon--he
4 wasn't, because he had just--knowing the drug activity there,
5 because as I say he allowed Mr. Hernandez to rummage through
6 his pockets looking for identification. It wasn't a
7 reasonable suspicion he was armed and dangerous and presented
8 a danger to the officer or anyone else.

9 He saw a bulge there. He wanted to know what it was, so
10 he patted him down. He started patting him down and feels a
11 film canister.

12 Now, the State has correctly stated Minnesota vs.
13 Dickerson, which says the object's incriminating character is
14 immediately apparent. The question now becomes whether the
15 film canister's incriminating character is immediately
16 apparent.

17 Officer Hall says yeah, a lot of drug people have them,
18 use them to carry drugs. Sometimes they are empty. Sometimes
19 they have drugs. Sometimes they have residue. Officer Hall
20 admits he possesses several film canisters. They are not
21 illegal to possess. If they are, it is up to Mr. Hall to say
22 what agency (inaudible) them.

23 A film canister is not per se contraband. The State in
24 their memorandum cites the Rushing case, which is out of
25 Missouri. I got a copy of the State's brief yesterday

1 afternoon. I had an opportunity to read the Rushing case.

2 In reviewing the case, the facts of the case are
3 different than this case. I believe that's one of the
4 important things we need to consider. In Rushing, what
5 happened is that a juvenile probation officer is driving down
6 the street, and he was blocked. The traffic was actually
7 blocked by a car in front of him, where the Defendant was--the
8 car was blocking traffic. Was not parked. The Defendant was
9 on the driver's side of the car conversing with the driver.
10 He looked both ways, looked around to see if anyone was
11 watching. And then he reached into his back pocket and handed
12 something to the driver, or appeared to hand something to the
13 driver. The driver handed something back to the Defendant,
14 who put that object in his pocket.

15 In this case we don't have those things. Plus, this is a
16 situation where the Defendant is walking down the street. Mr.
17 Ballard talks to him. They talk for a minute. There is no
18 looking around. Not the mutual passing of objects back and
19 forth. And then the probation officer calls the police, the
20 policeman came, and they found a lifesaver hole container.

21 This appears to be a minority decision. Minority in the
22 other courts that have had an opportunity to brief and
23 opportunity to review several cases, some of the cases that
24 were contained in the dissent in the Rushing case,
25 particularly one Campbell vs. State, which is 864 SW 2nd 223,

1 Texas appellate decision, where they specifically held that a
2 film canister, feeling a film cannister itself was not--that
3 was not immediately apparent that that was incriminating
4 evidence. And it was not admissible under plain feel.

5 Another case, Commonwealth vs. Stackfield, it is a
6 Pennsylvania Supreme Court decision, which the Court said
7 feeling a zip-lock bag in the Defendant's pocket was not
8 immediately apparent because it could be--it could contain
9 drugs or be the remainder of the Defendant's lunch.

10 I submit another Pennsylvania case, interest of BC, which
11 is a 1966 Supreme Court case, where there was a feeling of a
12 bag in the pants--in the waistband of sweatpants. In that
13 case the officer had already seen the bag, seen the Defendant
14 showing it to a woman. Saw it contained individual packets,
15 and saw the zip-lock bag. (inaudible) So prior to patting
16 him down, he had actually seen the item and believed it
17 contained--based upon his sight, plain view, that it contained
18 contraband.

19 State vs. Cline, which was a Connecticut Supreme Court
20 case in 1996, the officer felt the pocket, felt a hard rock-
21 like object or plastic, and heard the sound of plastic
22 crunching as he found it. He identified it as a rock. But
23 this was again--this was a rock cocaine. But this was a
24 search incident to the execution of a search warrant in a drug
25 house. And the Defendant was in the house when the search

1 warrant was being executed.

2 And people vs. Champion--

3 THE COURT: In that one did they allow--

4 MR. GRAVIS: They allowed it in. Like I say--

5 THE COURT: That was under those circumstances?

6 MR. GRAVIS: Under those circumstances. People vs.
7 Champion, which is a Michigan Supreme Court case in 1996.
8 This is a pill bottle. The Court allowed it in. But they
9 said you had to look at the totality of the circumstances.

10 In this case what they said was the officer had seen some
11 activity involving other persons. And they saw a person
12 talking to the Defendant in the car. The Defendant, when he
13 saw the officers, got out of the car and started walking away.
14 The officers were acquainted with the Defendant who had prior
15 drug and weapons convictions. They were in a high drug crime
16 area. The Defendant had his hands in the front of his
17 sweatpants. And the officer told him to remove his hands. He
18 refused to remove his hands from his sweatpants. And then
19 they found the pill bottle in the crotch area of the
20 sweatpants.

21 The Defendant had pockets in the sweatpants. The pill
22 bottle was actually shoved down inside the front of his pants
23 in the crotch area, the groin area. The Court went on to say
24 if the pill bottle had been in the pockets, the results may
25 have been different. In the pocket instead of his crotch

1 area. Or if he didn't have any pockets, that may have made
2 some difference. So they looked at the totality of the entire
3 circumstances. And particularly where the pill bottle was.

4 And Commonwealth vs. Crowther, which is out of Kentucky.
5 The officer felt what he thought was a drug bindle, and
6 described it felt like a small gum ball. They said well
7 that's--if it felt like a small gum ball, you can't reach into
8 his pocket and pull it out.

9 The Utah Court of Appeals or Supreme Court has not had
10 any cases involving the plain feel. So we are not sure where
11 the Utah Court will come down.

12 I submit the Rushing case is a minority position based on
13 the other cases I have been able to find. But Officer Hall
14 does not know what was in that film container until he sees
15 it, pulls it out and opens the lid. So the incriminating
16 character is not immediately apparent. He does not know it
17 has drugs in it, if it is empty, has film in. He just feels
18 the film container. And he was even able to identify what the
19 film container was.

20 And going back to the prior argument, he wasn't afraid
21 that it was a weapon. He saw the bulge. Now he testified it
22 could have been a weapon, or could have been something else.
23 But he had allowed the Defendant to put his hands in his
24 pockets. If he had really believed the Defendant was armed
25 and dangerous, he never would have allowed the Defendant to

1 put his hands in his pockets to start with.

2 So we submit that the search is illegal. And the items
3 seized should be suppressed.

4 THE COURT: Mr. Parmley.

5 MR. GRAVIS: Thank you.

6 THE COURT: Anything further?

7 MR. PARMLEY: Yes, your Honor. I would like to
8 respond to a couple of points Mr. Gravis has made.

9 He has suggested that Rushing is a minority case because
10 of the cases that he has found where the Court has denied the
11 admission of evidence. He talked about the film canister.
12 The Pennsylvania Supreme Court decision of a zip-lock bag.
13 The small gum ball.

14 The language that he read that I am remembering was he
15 said the zip-lock bag itself. And I can't remember what the
16 words were exactly, but the film canister per se. Or a small
17 gum ball per se. I think that's correct. If Norm Hall for
18 some other reason was having some sort of contact with the
19 Defendant and patted him down and detected what appeared to be
20 a film canister, I don't know that it would have been a proper
21 seizure. But you have to look at all of the circumstances.
22 You have to look at the totality of the circumstances in
23 deciding if there is probable cause for further intrusion.

24 Just as Mr. Gravis has said, the Texas Court, I believe
25 it was, said that the totality of circumstances becomes

1 important. And that is also what the Court in State vs.
2 Rushing said. They said that the officer had knowledge of the
3 suspicious transaction. And that was coupled with his
4 knowledge of the candy containers commonly used to store
5 drugs. And that's why in that case it was allowed.

6 In the case before this Court, Officer Hall has detailed
7 numerous concerns about what he had seen taking place on the
8 street. He has detailed what happened when he stopped and he
9 was talking to the suspect. And then we have another factor
10 that's added to this as well. And that's the Defendant's
11 refusal to remove that item from his pocket when he was
12 voluntarily taking everything out of his pocket to show
13 Officer Hall. In response to Officer Hall's question do you
14 have any weapons on you or identification, the defendant
15 starts removing everything from his pockets. Officer Hall can
16 see the bulge. Asked the Defendant what's that? Would you
17 remove that? The Defendant refuses to. And denies there is
18 anything there.

19 Officer Hall has knowledge of the suspicious transaction
20 on the street. The Defendant's refusal to take that item from
21 his pocket. Officer Hall in doing the pat down recognizes the
22 item immediately as a film canister, and knows what they are
23 typically used for.

24 Now, at that point he has articulated far more suspicion
25 than just, well I felt a film canister. And at that point he

1 has articulated probable cause. Reaches in and removes it.

2 I hardly know how to respond to the argument that the pat
3 down was just because this person is Hispanic. I think that
4 when Officer Hall has articulated so many details of this
5 transaction, that that argument hardly warrants response.

6 Officer Hall has said that they have got the report of
7 transient type Hispanic males in the area. But that isn't
8 what initiates Officer Hall and Officer Clark believing that
9 they had just seen a drug transaction. Officer Hall put into
10 words very well what he had seen as far as the exchange, the
11 brief encounter on the street. The buyer saying well it was
12 just a matter of my getting fifty cents from him, and reaching
13 into his left pocket and taking out fifty cents, when Officer
14 Hall saw very clearly that man, Mr. Ballard, putting whatever
15 it was he got into his right hand pocket. All of that is the
16 reason for his suspicion.

17 And finally, the argument that he didn't pat Mr. Ballard
18 down and he trusted the Defendant to allow the Defendant to be
19 pulling stuff out of his pockets, therefore Officer Hall
20 didn't have reasonable suspicion to believe that the Defendant
21 might have a weapon or believe that the Defendant may be a
22 danger to himself or anybody else. Well, the Officer on the
23 street walks a real fine line in deciding when he is going to
24 pat down for weapons and when he is not. The fact that he
25 doesn't immediately pat down for a weapon doesn't wipe out

1 what suspicion he already has. The point when he chooses to
2 put down for weapons is when he can see that bulge, and when
3 the Defendant refuses to produce it. And at that point,
4 Officer Hall's suspicions are such that he feels he needs to
5 pat the suspect down, and does so.

6 The fact that he didn't do it sooner, or didn't do it to
7 Mr. Ballard, doesn't wipe out the reasonable suspicion that he
8 may have been--that he may have been gathering throughout the
9 entire transaction. And the point the Defendant refuses to
10 identify what that bulge is in his pocket, in fact denies
11 there is anything in there, that's when Officer Hall's
12 suspicion rises to the point that he believes that the
13 Defendant may be armed and may be a danger to himself or
14 others.

15 I think that out on the street it is entirely reasonable
16 and prudent for Officer Hall to conduct the pat down in those
17 circumstances. And what he then discovers subsequent to that,
18 I have already argued as proper and constitutionally
19 justified, your Honor.

20 Thank you.

21 MR. GRAVIS: Briefly, your Honor, I would submit the
22 cases I cited were all cases involving questions about whether
23 there was a reasonable suspicion. And the Courts have got to
24 pass that question to determine whether or not the plain feel
25 doctrine would allow it in or not allow it in.

1 In talking about the Rushing case being a minority, you
2 have also got the case out of Illinois that talked about the
3 case of People vs. Champion when they looked at the totality
4 of the circumstances and said the big difference was where the
5 pill bottle was found. These cases that all revolve on
6 questions whether there is reasonable suspicion to conduct a
7 pat down or not.

8 But more importantly, your Honor, the State is saying,
9 well, I don't know how to respond about the Hispanic issue.
10 Well, Mr. Hernandez is a Hispanic. He may be a transient. I
11 don't know what a transient looking Hispanic male looks like.
12 But he was on 25th Street. He had a conversation with a white
13 individual. And this transaction occurred between Mr. Bauer,
14 who is a white individual, and Mr. Hernandez, a Hispanic. The
15 officer did not search Mr. Ballard.

16 Based upon Officer Hall's own testimony, people who are
17 involved in drugs are routinely armed and dangerous, that's
18 why he patted down Mr. Hernandez. But he never patted down
19 Mr. Ballard. Mr. Ballard allegedly pulled the change out of
20 his left pocket, not the pocket he put the object into.

21 There is some things there too. They had already talked
22 to Mr. Ballard before they went and talked to Mr. Hernandez,
23 and heard this was not a drug transaction. If they were going
24 to pat down Mr. Hernandez, they should have patted down Mr.
25 Ballard. If they had a reasonable suspicion to pat him down,

1 they had a reasonable suspicion to pat Mr. Ballard down.

2 Also, because he pulled the object out of his pocket
3 does not give them reasonable suspicion that's a weapon. It
4 gives them a reasonable suspicion or a hunch he has something
5 in there he doesn't want the officer to see. Whether that's
6 weapon or contraband or whatever, he doesn't have to pull it
7 out of his pocket. The officer can only pat him down if he
8 has a reasonable suspicion to believe it is a weapon and feels
9 it is a danger to the officer or others.

10 In this case he allowed the Defendant to rummage in his
11 pockets prior to the pat down. In fact the pat down is based
12 upon the fact he didn't pull that out. I submit if he had
13 believed he was armed and dangerous, he would have patted him
14 down first.

15 So it is our position, like I say, that there is no
16 reasonable suspicion he was armed and dangerous. The fact he
17 wouldn't pull the object out doesn't give rise to reasonable
18 suspicion he is armed and dangerous. It rises to the
19 suspicion he had something in his pocket he didn't want the
20 officer to see. If he had a weapon, he could have pulled it
21 out when he stuck his hands in there at first.

22 Thank you. We submit it.

23 THE COURT: Thank you.

24 This case involves the issue as to what is permissible
25 police intrusion into people's lives. And it is a very

1 important constitutional issue. We live in a society where
2 normally there is no right of a police officer to interfere
3 with our normal activity, unless there is a reasonable basis
4 to do so. And so this question centers around that important
5 issue.

6 Terry vs. Ohio is probably one of the earlier cases that
7 clarified general broad circumstances for police contact, and
8 any involvement or questioning. Our Supreme Court has gone on
9 to quite clearly define the level and what is needed at
10 different levels to justify additional police intrusion into
11 anyone's lives.

12 The level one stop is basically a Terry type permissible
13 involvement. You need very little. A level two, where you
14 get to the point where there may end up being a seizure, of
15 course requires articulable suspicion of criminal activity.
16 And then the level three which justifies the search or arrest
17 is the highest level.

18 And as has been stated by both parties, we have to look
19 at a totality of the circumstances. It is real interesting in
20 these areas that the courts seem to jump back and forth as to
21 whose point of view we are looking at. For example, in a
22 Terry stop, we are looking--and even in a level two stop, we
23 are looking at whether or not a person still has the freedom
24 to leave. And we look at it from that person's, the victim's
25 or the suspect's point of view, or the ordinary citizen's

1 point of view.

2 But there are points in time when an officer looking for
3 criminal activity, we look at the activity from his point of
4 view, as to what's reasonable from the officer's point of view
5 in proceeding. So we do have to look at the totality of the
6 circumstances.

7 Now, the Court finds in this case that the officers
8 initially saw what appeared to be a suspicious transaction.
9 That this was a possible drug type of exchange that is quite
10 commonly observed, or had been quite commonly observed, by
11 this particular officer in this area. That there had been
12 complaints and a nebulous type of definition of people that at
13 the present time were currently involved using a very vague
14 term about transient Hispanic. I don't know the difference
15 between a transient Hispanic or a Hispanic that's been
16 working, or someone that hasn't shaved, or how you might use
17 that term transient. But it did involve a claim that certain
18 Hispanic appearing males had been exchanging drugs in that
19 area.

20 And the record would reflect that this Defendant is an
21 olive skinned Hispanic appearing person. But again, that's
22 still a pretty vague kind of a definition, because that isn't
23 too clear. But in any event, there had been complaints about
24 drug transactions in this area by Hispanic appearing males.

25 One of the circumstances that is quite damning to--or at

1 least supportive of the officer's conduct in this case is
2 after he made the initial inquiry of Bauer or Ballard, or
3 whatever the gentleman's name was, he was obviously giving
4 some false information that he knew was false, because he had
5 seen the transaction and had seen a bill or a greenback or
6 currency transferred. And that was from a different pocket.
7 And that Bauer or Ballard was obviously not telling him
8 accurately what he had observed.

9 That created additional suspicion it appears in the
10 officer's mind that caused him then to pursue this further
11 with Mr. Hernandez. Mr. Hernandez then, after the officer had
12 articulable suspicion that there was criminal activity, was
13 approached and asked if he had any weapons. And I don't
14 recall if he was asked if he had drugs or identification. But
15 I believe he was asked some further questions besides weapons.
16 And Mr. Hernandez then began to take things out of his pockets
17 in the presence of the officer. And said he had everything
18 out, when it was obvious that he did not. There was obviously
19 still something in his pocket.

20 A continuing suspicion then, and a greater suspicion
21 obviously was developing when he kept saying, when it was
22 obvious that everything was out of his pocket, that he still
23 had this bulging container of some sort, or item in his
24 pocket. That a pat down revealed to an officer who said that
25 he had frequently observed canisters such as this being used

1 by drug dealers from his prior experience for containing the
2 drugs that they are selling. And he thought that it might be
3 a weapon.

4 The Court believes that it was appropriate then for him
5 to enter into the pocket and seize the item. And the
6 suspicion had raised to the level where he was justified in
7 confiscating and examining that item. And found it to have
8 what it appeared to be drugs.

9 The Motion to Suppress this evidence is denied. The
10 Court believes that the officer under the totality of the
11 circumstances was justified in the intrusion that he made in
12 this particular case. And that he complied with the
13 requirements of Utah law and the constitutions of Utah and the
14 United States in the seizure of the evidence.

15 So that will be admissible, if otherwise admissible in
16 the forthcoming case.

17 MR. PARMLEY: Your Honor, we are set for trial--

18 MR. GRAVIS: Set for pre-trial. Just a minute.

19 THE COURT: I am going to recess this case briefly.
20 We have another little hearing.

21 (Recess taken.)

22 MR. GRAVIS: Your Honor, this was also the time set
23 for pre-trial. At this time it is Mr. Hernandez' position it
24 cannot be resolved. We are looking for a trial date on the
25 5th of June a 9:30 in the morning.

Addendum B

State v. Rushing, 935 S.W.2d 30 (Mo. 1996),
cert. denied, 117 S.Ct. 1713 (1997)

STATE of Missouri, Respondent,
v.
Shaun Alexander RUSHING, Appellant.

No. 78838.

Supreme Court of Missouri,
En Banc.

Nov. 19, 1996.

Rehearing Denied Dec. 17, 1996.

Defendant was convicted, in the Circuit Court, Cape Girardeau County, John W. Grimm, J., of possession of a controlled substance with intent to distribute, and he appealed from denial of motion to suppress evidence. Appeal was transferred to the Supreme Court. The Supreme Court, Holstein, C.J., held that seizure of crack cocaine was authorized under plain feel exception to warrant requirement.

Affirmed.

Covington, J., dissented and filed separate opinion in which White, J., joined.

[1] ARREST ⚖️63.5(4)
35k63.5(4)

Investigative stop is permitted under Fourth Amendment when law enforcement officer is able to point to specific and articulable facts which, taken with rational inference from those facts, create reasonable suspicion that person has or is about to commit crime. U.S.C.A. Const.Amend. 4.

[2] ARREST ⚖️63.5(8)
35k63.5(8)

Once valid stop has been made, police may pat suspect's outer clothing if they have reasonable, particularized suspicion that suspect is armed; purpose of this limited search is not to discover evidence of crime, but to allow officer to pursue his investigation without fear of violence. U.S.C.A. Const.Amend. 4.

[3] ARREST ⚖️63.5(9)
35k63.5(9)

Officer had probable cause, based on his knowledge of suspicious transaction deserved by another officer, based on reputation of neighborhood as drug

trafficking area, and based on his knowledge of commonly used drug containers, to believe that cylindrical object discovered during pat-down search contained contraband; thus, officer did not exceed his authority, under Terry and under plain feel exception to warrant requirement, in seizing pill bottle from suspect. U.S.C.A. Const.Amend. 4; V.A.M.S. Const. Art. 1, § 15.

[4] CRIMINAL LAW ⚖️1144.12
110k1144.12

Denial of motion to suppress is reviewed only to determine whether evidence was sufficient to support ruling, and facts and reasonable inferences arising therefrom are to be stated favorably to order challenged on appeal.

[4] CRIMINAL LAW ⚖️1158(4)
110k1158(4)

Denial of motion to suppress is reviewed only to determine whether evidence was sufficient to support ruling, and facts and reasonable inferences arising therefrom are to be stated favorably to order challenged on appeal.

[5] ARREST ⚖️63.5(9)
35k63.5(9)

To justify seizure under plain-feel doctrine, officer must have probable cause to believe that item felt is contraband. U.S.C.A. Const.Amend. 4.

[6] SEARCHES AND SEIZURES ⚖️40.1
349k40.1

"Probable cause" exists when facts and circumstances within knowledge of seizing officer are sufficient to warrant person of reasonable caution to believe that item may be contraband or other evidence of crime. U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

[7] SEARCHES AND SEIZURES ⚖️40.1
349k40.1

Officer's factual knowledge, based on law enforcement experience, is relevant to probable cause determination. U.S.C.A. Const.Amend. 4.

[8] CONSTITUTIONAL LAW ⚖️18
92k18

Provisions of State Constitution may be construed to provide more expansive protections than comparable

federal constitutional provisions.

[9] SEARCHES AND SEIZURES ⚡12

349k12

State and federal constitutional protections from unreasonable searches and seizures are coextensive. U.S.C.A. Const.Amend. 4; V.A.M.S. Const. Art. 1, § 15.

[10] ARREST ⚡63.5(9)

35k63.5(9)

Plain-feel doctrine comports with state constitutional protections against unreasonable searches and seizures. U.S.C.A. Const.Amend. 4; V.A.M.S. Const. Art. 1, § 15.

*31 Gary E. Brotherton, Asst. Public Defender, Columbia, for appellant.

Jeremiah W. (Jay) Nixon, Attorney General, Christine M. Blegen, Assistant Attorney General, Jefferson City, for respondent.

HOLSTEIN, Chief Justice.

Shaun Rushing was convicted and sentenced to five years in prison for possession of a controlled substance with intent to distribute in violation of § 195.211, RSMo 1994. The trial court overruled Rushing's motion to suppress the evidence of cocaine seized both before his arrest during a "patdown" search and after arrest. Rushing appealed his conviction. The Missouri Court of Appeals, Eastern District, believing the case to present a question of general interest and importance, transferred the case to this Court pursuant to article V, § 10, of the Missouri Constitution. The decision of the trial court is affirmed.

I.

On October 12, 1994, Randall Rhodes, the chief juvenile officer for the 32nd Judicial Circuit, was driving on South Lorimier Street in Cape Girardeau when he encountered a car blocking his lane. The car was sitting in front of an apartment building known as "brick city," an area that Rhodes characterized as being known for drug trafficking and gang activity. Rhodes saw a man, whom he later identified as the defendant, Rushing, standing next to the driver's side door of the car. As Rhodes slowly drove around the car, he observed Rushing

look in all directions, reach into his front pants at the belt area, and then reach into the car as though he had something in his hand. Then Rhodes saw the driver of the car hand something to Rushing, who appeared to put the object in his pants pocket.

Based on his training and experience as a juvenile officer, Rhodes believed that he had witnessed a drug transaction. He went to the police station and reported the incident to Rick Price, a narcotics officer. Officer Price went to the area of the suspected drug transaction with Rhodes. Rhodes recognized Rushing on the front porch of 216 South Lorimier Street and pointed him out to Officer Price. Officer Price testified that he had previously executed search warrants at both 212 and 216 South Lorimier for drugs.

They parked the car, and Rhodes and Officer Price approached Rushing. Two other men were with Rushing. Officer Price identified himself as a police officer. Officer Price told the men that he had received information that Rushing was dealing drugs. Rushing denied this allegation. The other men left the porch and departed in different directions.

Officer Price testified that gang graffiti was present in the neighborhood, which caused him concern for his safety. Officer Price stated that, out of a concern for his safety and the safety of Mr. Rhodes, he conducted a patdown for "weapons and contraband." During the patdown, Officer Price ran his hand down Rushing's front pants pocket and felt a tubular item. Officer Price testified that he immediately thought that the item was a tubular plastic "Life Saver Hole candy container, which is a common container used by crack dealers to carry their crack cocaine in." Officer Price testified that he thought the container held crack cocaine. He based this belief on the information received from Rhodes, the area they were in, and his previous training and experience. Officer Price further explained that in his experience drugs are commonly carried in medicine bottles, "Life Saver Hole" candy *32 containers, plastic baggies, film canisters and other similar types of containers that are easily concealed in a pocket and are easily opened for removal of items.

Officer Price then removed the item from Rushing's pocket and discovered it to be a

cylindrical plastic medicine bottle, two and three-fourths inches long, having a diameter of one inch. [FN1] The bottle contained ten rocks of crack cocaine and some rice. Rushing was then arrested and taken to police headquarters, where the police found a wadded dollar bill containing more crack cocaine in the watch pocket of Rushing's pants.

FN1. Defendant does not contend, and nothing in the record suggests, that the size and shape of the medicine bottle seized is different from a "Life Saver Hole" candy container.

Rushing moved to suppress the introduction of the cocaine into evidence. After conducting a hearing, the trial court denied the motion.

II.

[1][2] An investigative stop is permitted under the Fourth Amendment when a law enforcement officer is able to point to specific and articulable facts which, taken with rational inference from those facts, create a reasonable suspicion that a person has or is about to commit a crime. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 1879-80, 20 L.Ed.2d 889 (1968). Once a valid stop has been made, police may pat a suspect's outer clothing if they have a reasonable, particularized suspicion that the suspect is armed. *Id.* at 27, 88 S.Ct. at 1883. "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 v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972).

[3] Rushing does not challenge the trial court's finding that the police were justified under *Terry* in stopping him and frisking him for weapons. Rather, Rushing contends that in seizing the pill bottle containing cocaine, Officer Price exceeded the scope of the limited intrusion authorized by *Terry*. Thus, the dispositive question is whether Officer Price was acting within the lawful bounds marked by *Terry* at the time he gained probable cause to believe that the item in Rushing's pants pocket contained contraband.

In *Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993), the Supreme Court approved the "plain-feel" exception to the warrant requirement. The court reasoned that 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...." *Id.* at 375-76, 113 S.Ct. at 2137. The court concluded that the search in *Dickerson* exceeded the scope of *Terry* because the incriminating character of the object felt was not immediately apparent to the officer. *Id.* at 379, 113 S.Ct. at 2139. The court emphasized that "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." *Id.* at 378, 113 S.Ct. at 2138 (quoting *State v. Dickerson*, 481 N.W.2d 840, 844 (Minn.1992)).

[4] Conversely, in the present case the trial court overruled the motion to suppress because it found that the incriminating character of the object felt was immediately apparent to Officer Price. In reviewing the trial court's denial of the motion to suppress, we look only to determine whether the evidence was sufficient to support the ruling. *State v. Burkhardt*, 795 S.W.2d 399, 404 (Mo. banc 1990). The facts and reasonable inferences arising therefrom are to be stated favorably to the order challenged on appeal. *State v. Blair*, 691 S.W.2d 259, 260 (Mo. banc 1985), cert. dismissed, 480 U.S. 698, 107 S.Ct. 1596, 94 L.Ed.2d 678 (1987). It is not this court's province to substitute its discretion for that of the trial court. *Burkhardt*, 795 S.W.2d at 404.

According to his testimony, Officer Price's first impression was that the object was a container of crack cocaine; there was no further manipulation of the object. Officer *33 Price testified that upon feeling the object, he "immediately thought that it was ... a Life Saver Hole candy container, which is a common container used by crack dealers to carry their crack cocaine in." He believed that the container held crack cocaine because of the surrounding circumstances and his training and experience as a police officer. Officer Price testified: "Because of the information I received from Officer Rhodes, the area we were in, and from my previous training and experiences in arresting crack dealers, [I knew] that that's what they carry their crack cocaine in." In ruling on the motion to

suppress, the trial court also considered a list of cocaine arrests and seizures of the Cape Girardeau Police Department, which was prepared by Officer Price and admitted into evidence at the suppression hearing. The list consisted of the complaint or report number and the type of container in which the crack cocaine was found. This evidence, taken as a whole, is sufficient to support the trial court's finding that at the moment Officer Price felt the item, it was immediately identifiable as contraband and was, therefore, subject to seizure.

[5][6][7] The Supreme Court has equated the requirement that an item in plain view or feel be "immediately apparent" as contraband or other evidence of a crime with the probable cause standard. *Minnesota v. Dickerson*, 508 U.S. 366, 376, 113 S.Ct. 2130, 2137, 124 L.Ed.2d 334 (1993); *Arizona v. Hicks*, 480 U.S. 321, 326, 107 S.Ct. 1149, 1153, 94 L.Ed.2d 347 (1987); *Texas v. Brown*, 460 U.S. 730, 741-42, 103 S.Ct. 1535, 1542-43, 75 L.Ed.2d 502 (1983) (plurality opinion). Thus, to justify a seizure under the plain-feel doctrine, the officer must have probable cause to believe that the item felt is contraband. Probable cause exists when the facts and circumstances within the knowledge of the seizing officer are sufficient to warrant a person of reasonable caution to believe that the item may be contraband or other evidence of a crime. *Texas v. Brown*, 460 U.S. at 742, 103 S.Ct. at 1543 (plurality opinion); *State v. Hornbeck*, 492 S.W.2d at 802, 805 (Mo.1973). Relevant to this determination is the officer's factual knowledge, based on his law enforcement experience. See *Texas v. Brown*, 460 U.S. at 742-43, 103 S.Ct. at 1543-44 (plurality opinion). The facts recited above would lead a reasonable person to believe that drugs were present in the container felt by Officer Price. In sum, the following elements properly support a finding that Officer Price had probable cause to conclude that Rushing was carrying cocaine before he seized the container: 1) the officer's feel of the object, 2) his knowledge of the suspicious transaction observed by Rhodes, 3) the reputation of the neighborhood as a drug trafficking area, and 4) his knowledge of commonly used drug containers.

There is sufficient evidence to support a finding of probable cause even though Officer Price felt the container rather than the cocaine itself. In the analogous plain-view context, a plurality of the

United States Supreme Court in *Texas v. Brown* dismissed as "all but irrelevant" the officer's inability to see through the opaque fabric of a seized balloon believed to contain cocaine. *Id.* at 743, 103 S.Ct. at 1543-44. In determining that the officer had probable cause to seize the balloon, the *Brown* plurality relied on the officer's testimony that he was aware, both from previous narcotics arrests and from discussions with other officers, that balloons tied in the manner of the one possessed by the defendant were frequently used to carry narcotics. *Id.* at 742-43, 103 S.Ct. at 1543-44. Similarly, in the present case, Officer Price testified that, because of his training and experience, he knew that the type of container he felt was frequently used to carry cocaine. The distinctive character of the container itself revealed its probable contents to the trained officer. Thus, under the totality of the circumstances, the trial court did not err in finding that Officer Price had probable cause to believe that the container held cocaine before he put his hand into Rushing's pocket.

III.

As discussed above, the Supreme Court's decision in *Dickerson* established that the plain-feel doctrine does not offend guarantees of the Fourth Amendment of the United States Constitution. Nevertheless, Rushing asks this Court to reject the plain-feel doctrine *34 as violating article I, § 15 of the Missouri Constitution.

[8][9] Article I, § 15 of the Missouri Constitution provides that "the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures...." This provision parallels the Fourth Amendment of the United States Constitution, which preserves "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...." Provisions of our state constitution may be construed to provide more expansive protections than comparable federal constitutional provisions. However, the construction given to the Fourth Amendment of the federal constitution by the Supreme Court of the United States is strongly persuasive in construing the like section of our state constitution. *Star Square Auto Supply Co. v. Gerk*, 325 Mo. 968, 30 S.W.2d 447, 456 (1930). The state and federal constitutional protections from unreasonable searches and seizures

are coextensive. *State v. Jones*, 865 S.W.2d 658, 660 (Mo. banc 1993).

[10] Despite its acceptance by the United States Supreme Court, Rushing invites this court to reject the plain-feel doctrine under our state constitution because, he argues, the doctrine blurs the limits of a Terry search. The invitation is declined. The plain-feel doctrine, within the narrow limits set by *Dickerson*, does not countenance even the slightest expansion of the Terry patdown beyond that which is required to search for weapons. Rather, the plain-feel doctrine provides that if an officer discovers what is immediately apparent as contraband during the limited search for weapons, he is not required to ignore it. The plain-feel doctrine neither expands the scope of Terry nor blurs its limits. It is merely a logical extension of the plain-view exception to the warrant requirement, which has long been accepted by Missouri courts as comporting with federal and state constitutional provisions. See, e.g., *State v. Blankenship*, 830 S.W.2d 1, 14 (Mo. banc 1992). No justification exists for expanding the protection of article I, § 15, beyond that provided by the Fourth Amendment.

IV.

Finally, Rushing argues that the cocaine found wrapped in a dollar bill in his pocket following arrest should have been suppressed as the product of the supposedly illegal seizure prior to arrest. Because the original seizure of the medicine bottle containing cocaine is valid, the additional cocaine seized following the arrest is not the fruit of an illegal seizure.

CONCLUSION

The judgment of the trial court is affirmed.

BENTON, PRICE, LIMBAUGH and
ROBERTSON, JJ., concur.

COVINGTON, J., dissents in separate opinion
filed.

WHITE, J., concurs in opinion of COVINGTON,
J.

COVINGTON, Judge, dissenting.

I respectfully dissent. The question is whether the

officer's tactile perception of the object gave him immediately, without further searching, probable cause to believe the object contained contraband. I disagree with the majority's conclusion that Officer Price had probable cause to search the defendant's pocket. My disagreement with the majority is simply one of where to strike the proper balance. I believe that the effect of the majority opinion is to reduce the probable cause standard to one of reasonable suspicion.

The majority relies on *Texas v. Brown*, 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) (plurality opinion). Whether probable cause is required to invoke the plain-view doctrine, directly analogous to the plain-feel doctrine, was an issue left open in *Brown*. Later, however, in *Arizona v. Hicks*, a premises case, the United States Supreme Court held that probable cause is, in fact, required to invoke the plain-view doctrine. 480 U.S. 321, 326, 107 S.Ct. 1149, 1153, 94 L.Ed.2d 347 (1987). Justice Scalia, writing for the Court, explained:

*35 Dispensing with the need for a warrant is worlds apart from permitting a lesser standard of cause for the seizure than a warrant would require, i.e., the standard of probable cause. No reason is apparent why an object should routinely be seizable on lesser grounds, during an unrelated search and seizure, than would have been needed to obtain a warrant for that same object if it had been known to be on the premises. *Id.* at 327, 107 S.Ct. at 1153-54.

In *Hicks*, police officers entered an apartment looking for a suspect in an apartment shooting. They seized weapons and a ski-mask. One of the officers noticed two sets of expensive stereo components that looked out of place. He recorded the serial numbers. In order to view the serial numbers, he moved some of the components. He reported the numbers to headquarters. Upon being told that the turntable was reported stolen, he seized the turntable. The Court held that moving the components to view the serial numbers constituted a search unrelated to the search for the shooter and the weapons. *Id.* at 325, 107 S.Ct. at 1152-53. A finding of probable cause was required to uphold the search of the stereo components. *Id.* at 326, 107 S.Ct. at 1153. The State conceded that the officer in *Hicks* had only reasonable suspicion to believe the components were stolen; therefore, the search was unconstitutional. *Id.*

Other jurisdictions have found similar searches to have exceeded the authority of *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). In *Commonwealth v. Crowder*, the Kentucky Supreme Court invalidated a search under circumstances similar to the present case. 884 S.W.2d 649 (Ky.1994). Crowder had been previously arrested in the same "hot drug area." The police had received a tip that if Crowder was in that area he would be dealing drugs. When Crowder saw the police watching him, he walked away. The officer stopped him, searched him, and felt what the officer described as "something like a small gumball." The officer also stated that it "felt like it may have been a bundle of drugs." Id. at 650. The court stated that the search was invalid because the officer did not immediately recognize what he felt in Crowder's pocket as drugs. "The nature of the non- threatening contraband was not immediately apparent to [the] officer" when he was conducting the patdown search. Id. at 652.

Likewise, in *Commonwealth v. Stackfield*, an officer seized several zip-lock baggies after a patdown search. 438 Pa.Super. 88, 651 A.2d 558 (1994). The officer testified that he thought the bags felt like packaging materials that are often used for carrying drugs. The Pennsylvania Superior Court held that the search was invalid. "A zip-lock baggie is not per se contraband, although material contained in a zip-lock baggie may well be." Id. 651 A.2d at 562. See also *Campbell v. State*, 864 S.W.2d 223 (Tex.App.1993) ("The incriminating character of a 35 millimeter film canister was not 'immediately apparent' under the facts before us to justify its seizure"). These cases, read together with *Arizona v. Hicks*, would seem to tip the scales in favor of finding a lack of probable cause.

The majority's reliance on *Texas v. Brown* is questionable in another respect; the majority extends *Brown* well beyond its facts. During a traffic stop a police officer saw Brown holding an

uninflated, opaque, green party balloon tied off at the end. The balloon contained heroin. The Court held that the search was proper because the nature of the balloon as contraband was immediately apparent. Id. at 743, 103 S.Ct. at 1543-44. The balloon was in plain view; the officer did not have to search to find the contraband.

The facts of the present case are distinguishable. Officer Price testified that he first patted down the defendant for "weapons and contraband." The officer searched the defendant and felt the bottle in his front pants pocket. The officer testified that he "thought it was a Life Savers Holes candy container." Although he testified further that he knew this to be a container commonly used by drug dealers to carry crack, there is nothing distinctive about a candy container. The container was actually a prescription pill bottle, and it was impossible for him to discern what the bottle contained. The nature *36 of the bottle as contraband was not apparent to the officer until after he removed the bottle from the defendant's pocket. Put another way, the nature of the container as contraband was not immediately apparent to the officer.

Certainly there are factors that support affirmance in this case, those being the officer's information regarding defendant's drug activities and the officer's experience in narcotics enforcement. It would be difficult to disagree that Officer Price had reasonable suspicion that the defendant was carrying contraband. That suspicion, however, did not rise to the level of probable cause necessary for a valid search under *Dickerson's* plain-feel exception. Reasonable suspicion is not transformed into probable cause simply by relabeling.

The search of the defendant's pocket and seizure of the bottle exceeded the scope of authority of *Terry* and *Dickerson*. I would reverse.

END OF DOCUMENT