

2003

## Utah v. Daniel J. Peterson : Brief of Respondent

Utah Court of Appeals

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### Recommended Citation

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**IN THE UTAH SUPREME COURT**

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STATE OF UTAH,

Plaintiff/Petitioner,

vs.

DANIEL J. PETERSON,

Defendant/Respondent.

Case No. 20030802-SC

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**BRIEF OF RESPONDENT**

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**ON PETITION FOR WRIT OF CERTIORARI  
TO THE UTAH COURT OF APPEALS**

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**UTAH SUPREME COURT  
BRIEF**

**UTAH  
DOCUMENT**

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**DOCKET NO. 20030802-SC**

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**FILED  
UTAH APPELLATE COURTS**

**AUG 5 - 2004**

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**IN THE UTAH SUPREME COURT**

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STATE OF UTAH,

Plaintiff/Petitioner,

vs.

DANIEL J. PETERSON,

Defendant/Respondent.

Case No. 20030802-SC

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\* \* \* \*

**BRIEF OF RESPONDENT**

\* \* \* \*

**JURISDICTION AND NATURE OF PROCEEDINGS**

This case is before the Court on a writ of certiorari to the Utah Court of Appeals.

This Court has jurisdiction under Utah Code Annotated § 78-2-2(3)(a) & -2(5).

**ISSUE PRESENTED AND STANDARD OF REVIEW**

Whether the Utah Court of Appeals correctly applied the well established *Terry* Frisk Doctrine in concluding that once the circumstances that justify a limited *Terry* frisk are no longer present, any further search violates Fourth Amendment safeguards?

On certiorari, this Court reviews “the decision of the court of appeals, not the decision of the trial court.” *State v. Harmon*, 910 P.2d 1196, 1199 (Utah 1995). The court of appeals’ decision is reviewed for correctness. *State v. James*, 2000 UT 80, ¶ 8, 13 P.3d 576. “The correctness of the court of appeals’ decision turns on whether that court accurately reviewed the trial court’s decision under the appropriate standard of

review.” *State v. Visser*, 2000 UT 88, ¶ 9, 22 P.3d 1242.

## **CONTROLLING STATUTORY PROVISIONS**

### **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.

## **STATEMENT OF THE CASE**

Daniel Peterson, was charged with possession or use of methamphetamine in a drug-free zone, a second degree felony, in violation of Utah Code Annotated § 58-37-8(2)(a)(i); and possession of drug paraphernalia in a drug-free zone, a class A misdemeanor, in violation of Utah Code Annotated § 58-37a-5(a) (R. 6-7).

On January 18, 2002, Peterson moved to suppress the evidence on ground that the search of his personal property constituted an illegal warrantless search under the Fourth Amendment to the United States Constitution (R. 24-30). On January 24, 2002, a suppression hearing was held before Judge Taylor (R. 85, 210). At the close of the hearing, Judge Traylor denied the motion concluding that the search of Peterson’s coat was justified as a *Terry* frisk (R. 210: 52, 54). On January 25, 2002, Peterson filed a motion to reconsider the ruling denying his motion to suppress (R. 118-22).

On January 25, 2002, Peterson filed a Motion to Submit Judgment on Warrantless Search of Shoes asserting that while the trial court “previously held that the search of Mr. Peterson’s coat was justified by the warrant exception articulated in *Terry v. Ohio*, 392

U.S. 1 (1968),... no finding or ruling was made as to the warrantless search of Mr. Peterson's shoes" (R. 107).

Thereafter, Peterson was tried by a jury and convicted of possession of drug-paraphernalia in a drug free zone, a class A misdemeanor, and the lesser-included charge of possession/use of methamphetamine, a third degree felony (R. 126, 129, 212: 204). On March 27, 2002, Peterson was sentenced to concurrent terms of 0-1 years and 0-5 years at the Utah State Prison (R. 193-94, 211).

Peterson filed a timely notice of appeal (R. 198). On direct appeal, the Court of Appeals reversed. *State v. Peterson*, 2003 UT App 300, ¶13, 77 P.3d 646.

### **STATEMENT OF RELEVANT FACTS<sup>1</sup>**

On December 28, 2001, Officer Russ Billings of the Provo City Police Department received an anonymous report that adults were using methamphetamine in the presence of children at a Provo residence (R. 205: 6; 212: 105-08). Officer Billings, along with several other officers, went to the residence to perform a welfare check on the children (R. 205: 6, 20). A woman answered the door and informed Officer Billings that her adult daughter, Dawn Webster, was the tenant (R. 205: 7, 12). Webster came to the door shortly thereafter and, according to Officer Billings, gave consent to the officers' entry and search of her apartment (R. 205: 7-8; 212: 108).

Officer Billings proceeded with Webster to a bedroom, upstairs and down a short hallway, where Webster's baby was sleeping (R. 210: 5; 212: 109). Webster and Officer

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<sup>1</sup> The facts are taken directly from the court of appeals decision in *State v. Peterson*, 2003 UT App 300, ¶¶3-6.



Billings had been in the bedroom for approximately three or five seconds when Peterson unexpectedly emerged from the closet wearing light clothing and no shoes (R. 205: 7-8; 210: 6, 8, 9, 15-16; 212: 109-110, 156). Webster screamed out to her mother asking what the mother's boyfriend was doing in Webster's bedroom (R. 205: 33). Startled by Peterson's emergence from the closet, Officer Billings stepped back and ordered Peterson to stop, turn around, and place his hands where the officer could see them (R. 205: 8; 210: 9-10). Peterson complied and Officer Billings then handcuffed him and patted him down for weapons (R. 205: 8; 210: 10, 17; 212: 138). Finding no weapons, Officer Billings asked another officer to escort Peterson outside (R. 205: 9-10; 210: 10, 17; 212: 38).

Within about sixty seconds of the pat-down, Officer Billings noticed a coat on the floor of the closet where Peterson had been standing (R. 212: 11, 138). Officer Billings asked a child who had entered the bedroom if the coat belonged to Peterson (R. 205: 9, 17, 212). The child responded affirmatively (R. 210: 11, 13). Webster confirmed that the coat belonged to Peterson, and that Peterson had been wearing it when she answered the door (R. 205: 9, 17). Officer Billings picked up the coat, intending to take it to Peterson (R. 210: 15; 212: 31, 112). For safety purposes, he patted down the pockets of the coat (R. 205: 9). In doing so, Officer Billings felt a syringe in the right pocket (R. 210: 11; 212: 12). Officer Billings removed the syringe, which contained a brown liquid that later tested positive for methamphetamine (R. 205: 10). Meanwhile, another officer picked up a pair of shoes within three feet of the closet (R. 212: 166). Inside one of the shoes, the officer found a baggy full of syringes (R. 205: 9, 26-27; 212: 118-19, 166-67). Once the

syringes were removed from Peterson's coat and shoes, Officer Billings took the items to Peterson who, by then, was standing on the front porch in the "extremely cold" December weather (R 205: 13; 212: 131-32). Peterson was then arrested for drug offenses (R. 205: 24).

Before trial, Peterson moved to suppress all evidence found in his coat and shoes, claiming it was obtained by an illegal search and seizure (R. 24-30). The trial court denied Peterson's motion to suppress, finding that the search of the coat and shoes was within the scope of a lawful *Terry* frisk (R. 210: 52, 54). Peterson was subsequently convicted of possession of methamphetamine and paraphernalia.

### **SUMMARY OF THE ARGUMENT**

The Court of Appeals correctly applied the *Terry* frisk doctrine to the facts of this case and accurately concluded that once the circumstances that justified the original pat-down were no longer present, the officer exceeded the scope of the lawful frisk by subsequently searching the coat lying on the floor.

The facts of this case clearly display that Peterson posed no danger or threat to Officer Billings or any other person when the coat was searched. Officer Billings had Peterson placed in handcuffs and escorted outside and Peterson remained outside under the supervision of another officer. At this point, it was impossible for Peterson to gain access to any weapon.

And if there was any need for Peterson to wear a coat, it was due to the fact that Officer Billings created the need to search the coat by forcing Peterson outside and then

handing him his coat. This Court has made it clear that officers cannot create the exigent circumstance in order to justify a warrantless search.

Accordingly, the Court of Appeals correctly determined that the subsequent search was an unlawful *Terry* frisk violating the Fourth Amendment.

### **ARGUMENT**

#### **I. THE FOURTH AMENDMENT PREVENTS POLICE OFFICERS FROM CREATING AN EXIGENCY IN ORDER TO JUSTIFY A *TERRY* SEARCH WHEN THE SUSPECT NO LONGER POSES A THREAT TO THE OFFICERS' SAFETY**

The Court of Appeals correctly found that once Peterson was handcuffed and escorted outside, “[t]here then remained no reasonable expectation or apprehension that Peterson could access a weapon” which would pose a threat to the officers at the scene. *State v. Peterson*, 2003 UT App 300, ¶ 13, 77 P.3d 646. Accordingly, the Court of Appeals correctly held that the subsequent search of Peterson’s coat exceeded the scope of the *Terry* frisk. *Id.* Additionally, Peterson asserts that police officers cannot create the exigency in order to justify a warrantless search. Thus, the Court of Appeals’ decision can be upheld on the grounds that Officer Billings exceeded the scope of the original *Terry* frisk or that officers cannot create the exigent circumstance in order to justify a warrantless search.

##### **A. The Subsequent Search of the Coat Exceeded the Lawful Frisk.**

The State agrees that the question before this Court is whether Officer Billings’ search of the coat “was reasonably related in scope to the circumstances which justified

the interference in the first place.” *State v. Lafond*, 2003 UT App 101, ¶¶ 11-12, 68 P.3d 1043; *see also Terry v. Ohio*, 393 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); (Br. of Pet. at 9). However, the State misconstrues *Terry* and its progeny by comparing the facts of this case to automobile stops and with the particular dangers that traffic stops pose to police officers when they already have reasonable, articulable suspicion that the suspect is armed and dangerous (Br. of Petitioner at 10).

Thus, the State misinterprets the *Terry* doctrine and its application. The United States Supreme Court observed in *Terry* that “a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope.” *Terry*, 392 U.S. at 18-19, 88 S.Ct. at 1878. Moreover, officers may not pursue a line of investigation not “reasonably related in scope to the circumstances which justified the interference in the first place.” *Lafond*, 2003 UT App at ¶ 12. Thus, once officers apprehend a suspect pursuant to reasonable suspicion, they may frisk the suspect in order to dispel or confirm whether the suspect is carrying a weapon, but once that determination has been made, a further search is beyond the scope of the initial frisk. *See generally Terry*, 392 U.S. 1, 88 S.Ct. 1868.

To support its misplaced claim, the State first cites to *Michigan v. Long*, 463 U.S. 1032, 1047, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). In *Long*, officers stopped the defendant after they observed him driving erratically and at excessive speed. *Id.* at 1035. Long met the officers at the rear of his vehicle. *Id.* After repeated requests to produce his license, Long turned from the officers and approached the open door of his car. *Id.* at 1036. Both officers followed Long and then observed a long hunting knife in the

floorboard of his car. *Id.* The officers then stopped Long and subjected him to a *Terry* frisk, which revealed no weapons. One officer looked into the car with a flashlight and noticed something protruding from the front seat. *Id.* The purpose of the search was “to search for other weapons.” *Id.* The officer then entered the car and while searching under the seat, he noticed a pouch on the front seat that contained marijuana. *Id.* Long was subsequently convicted of marijuana possession. *Id.*

Long claimed on appeal that the *Terry* frisk was invalid because it was a search of an area rather than his person. *Long*, 463 U.S. at 1045. The United States Supreme Court rejected this claim on the grounds that police can conduct protective searches when they have a reasonable belief that the suspect poses a danger to them that arises “from the possible presence of weapons in the area surrounding the suspect.” *Id.* at 1049.

The Court observed that situations involving suspects stopped in vehicles are particularly dangerous to officers. *Long*, 463 U.S. at 1047. The Court noted that “investigative detentions involving suspects in vehicles are especially fraught with danger to police officers.... [considering the] inordinate risk confronting an officer as he approaches a person seated in an automobile.” *Id.* at 1047-48 (citation omitted). To support this position, the Court stated that approximately 30% of police shootings occur when an officer is approaching a suspect seated in an automobile. *Id.* at 1048, n. 13.

Citing to *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), the Court noted that “when an arrest is made, it is reasonable for the arresting officer to search ‘the arrestee’s person and the area within his immediate control.’” *Long*,

463 U.S. at 1048. Under the principals set forth in *Terry* and its progeny, the Court then concluded:

Our past cases indicate then that protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger, that roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a suspect. These principles compel our conclusion that the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on “specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant” the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.

*Id.* at 1049 (quoting *Terry*, 392 U.S. at 21).

The Supreme Court further concluded that the officers in *Long* were “reasonable [in their] belief that Long posed a danger if he were permitted to reenter his vehicle” since he would have access to possible weapons inside. *Long*, 463 U.S. at 1050. This conclusion was based on the fact that because Long was not handcuffed, he might “break away from police control and retrieve a weapon from his automobile.” *Id.* at 1051. “Or,” the Court stated, “the suspect may be permitted to reenter the vehicle before the *Terry* investigation is over, and again, may have access to weapons.” *Id.* at 1052. In any event, the Supreme Court “stress[ed]” that such a warrantless search is allowed only because “the officer remains particularly vulnerable in part *because* a full custodial arrest has not been effected.” *Id.* (emphasis in original).

Thus, the police had reason to believe that Long was armed and dangerous, and if they did not search the vehicle, he might immediately obtain a weapon since he was not yet handcuffed. *See Long*, 463 U.S. at 1035, 1052.

The fact that officers can search the grab area of a lawfully stopped vehicle, if they have reasonable suspicion that the suspect is armed, is not analogous to this case. *Terry* and its progeny explicitly allow police officers to conduct limited searches when a suspect may be able to gain immediate access to a weapon, such as the circumstances found in *Long*. However, once the suspect is in full custody and the suspect is no longer able to exercise any control over a weapon, any continuing search exceeds the scope of the original *Terry* frisk. *See Long*, 463 U.S. at 1052.

*Long* is certainly not analogous to the facts of this case. For one, Officer Billings had no specific and articulable facts to believe that Peterson was able to gain immediate control of any weapons. Officer Billings admitted that there was nothing about the coat or the surrounding circumstances that caused him to believe that there might be a weapon in the coat (R. 210: 20). Moreover, Officer Billings admitted that he was not concerned for his safety regarding the coat unless--or until--the coat was handed to Peterson outside the residence (R. 210: 22). Furthermore, Peterson was handcuffed and placed outside the residence in the presence of another officer, and thus was in *full* police custody (R. 210: 21). It would have been impossible for Peterson to “break away from police control and retrieve a weapon from his [coat].” *See Long*, 463 U.S. at 1051. Accordingly, the Court of Appeals correctly held that when “Officer Billings picked up the coat and patted it down for weapons, he exceeded the scope of the lawful frisk.” *Peterson*, 2003 UT App at ¶ 13.

The State further claims that *Terry* and its progeny have extended weapons frisks to, “among other things, a diaper bag, jacket, duffel bag, motel room, knapsack, and

paper bag.” (Br. of Petitioner at 11). However, a quick review of these cases also reveals that they are not analogous to the facts in this case. *See, e.g., State v. Harrison*, 805 P.2d 769 (Utah App. 1991) (murder suspect arrested and diaper bag nearby was subsequently searched as a search incident to arrest, revealing the murder weapon); *State v. Vasquez*, 807 P.2d 520, 523 (Ariz. 1991) (officer called to scene of domestic dispute searched suspects jacket after suspect *asked* for it and officer told suspect he would have to search the jacket and suspect did not object); *Servis v. Commonwealth*, 371 S.E.2d 156, 160-61 (Va. App. 1988) ( search of suspect’s motel room justified by exigent circumstances and officer’s reasonable belief that suspect was reported armed burglar); *Jordan v. State*, 531 A.2d 1028, 1031-32 (Md. App. 1987) (officer justified in searching suspects bag after reasonable belief that weapon was in bag and suspect was looking in bag); *State v. Ortiz*, 683 P.2d 822, 828 (Haw. 1984) (officer had reasonable suspicion that knapsack had a gun in it and officer took knapsack from suspect); *United States v. Johnson*, 637 F.2d 532, 534-35 (8th Cir. 1980) (officer searched suspect’s duffel bag that the suspect was holding after reasonable belief that it contained a gun); *People v. Bowles*, 289 N.Y.S.2d 526, 528 (1968) (pre-dating *Terry* by three months) (officer knew in advance that defendant had a razor in his pants and accordingly conducted a ‘frisk’ of the pants that were on the floor).

None of these cases are analogous to the facts of this case since the officers in each of these cases had specific, articulable suspicion that the suspects had immediate access to or control of a weapon. Just the opposite is true in this case. After Peterson was handcuffed and escorted outside the residence, any specific, articulable suspicion that may have existed was quickly abated once he was in the full custody of the other



officer. Peterson never asked Officer Billings to hand him the coat (R. 210: 20); *see Vasquez*, 807 P.2d at 523. Nor was there any suspicion that Peterson had been engaged in a dangerous crime or that there was a dangerous weapon at the scene. Thus, Officer Billings' warrantless search exceeded the scope of the lawful frisk.

**B. Police Cannot Create the Exigency To Justify A Warrantless Search**

Next, the State incorrectly claims that this case presents circumstances where “the officer might ‘reasonably suspect the possibility of harm if he returns [property] unexamined.’” (Br. of Petitioner at 11). While there may be situations where it would be unwise to return property to a suspect, Peterson asserts that police officers cannot create the exigent circumstance in order to search any item they please.

Controlling authority is clear that police cannot create the exigent circumstance in order to justify a warrantless search. *See State v Beavers*, 859 P.2d 9, 18 (Utah App. 1993). While the State claims that the Court of Appeals' ruling forces police officers to choose between leaving Peterson outside with no coat or giving him a coat that may contain a weapon, such is not the case under these facts (Br. of Petitioner at 8-9). Here, Officer Billings had Peterson removed from the residence in handcuffs. Once Peterson was outside, Officer Billings had no reason to believe that he was a threat to him or anyone else. It was the officer's decision to place Peterson outside in the cold weather. Peterson did not request anything from the officer (R. 210: 20). If there was any need for Peterson to wear a coat, it was due to the fact that Officer Billings created the need to search the coat by forcing Peterson outside and then handing him his coat.

Under the State's theory, police would be allowed to exceed the scope of a lawful *Terry* frisk after they have already determined a suspect is no longer armed or dangerous by simply removing the suspect from the premises and then handing the suspect any item they want searched. The police would only need to claim a need to hand the suspect the item and then a need to search the item in order to protect themselves, effectively creating the exigency for the warrantless search.

The State's argument misunderstands the fundamental protections the Fourth Amendment provides. Although the State accurately portrays that any warrantless search must be scrutinized against "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security," the State then advocates a position that violates Fourth Amendment protections by allowing officers to exceed the scope of lawful frisks once the circumstances that justify the frisk are no longer present (Br. of Petitioner at 14; quoting *State v. Warren*, 2003 UT 36, ¶ 31, 78 P.3d 590). To allow government agents to continue searching once the circumstances that justify the search are no longer present or to create the exigent circumstance that would allow a suspect to gain control of a possibly dangerous weapon violates the Fourth Amendment. But this is exactly the position the State is supporting and this is why the Court of Appeals' decision correctly balances the competing interests of officer safety and personal privacy.

The State is rightly concerned about ongoing officer safety and the Court of Appeals' decision in no way risks an officer's safety. The decision adequately considered Officer Billings' safety in this matter and correctly concluded that once

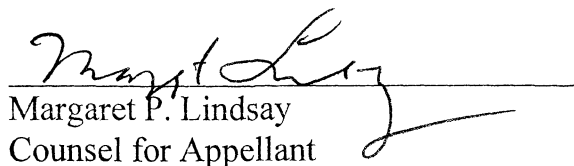
Peterson was handcuffed and escorted outside, “there then remained no reasonable expectation or apprehension that Peterson could access a weapon.” *Peterson*, 2003 UT App at ¶ 13. Moreover, Officer Billings cannot create the exigent circumstance by removing Peterson outside in the cold and then claim the need to conduct further searches in order to protect himself (R. 210: 53).

Peterson asserts that the Court of Appeals’ analysis of the *Terry* doctrine applied to the facts of this case provides a well reasoned opinion that balances Fourth Amendment protections with an officer’s safety and accordingly, this Court should uphold that decision.

### **CONCLUSION AND PRECISE RELIEF SOUGHT**

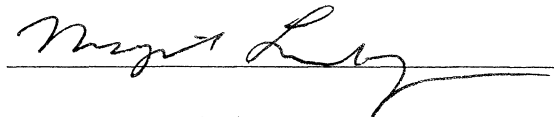
For the reasons set forth above, Peterson asks this Court to affirm the Court of Appeals’ decision.

RESPECTFULLY SUBMITTED this 5 day of August, 2004.

  
Margaret P. Lindsay  
Counsel for Appellant

**CERTIFICATE OF MAILING**

I hereby certify that I delivered four (4) true and correct copies of the foregoing Brief of Respondent to Marian Decker, Assistant Attorney General, Appeals Division, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 5 day of August, 2004.

A handwritten signature in cursive script, reading "Margaret Lindsay", is written over a horizontal line.

Margaret P. Lindsay  
Counsel for Appellant

## **ADDENDA**

P

Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,  
 v.  
 Daniel J. PETERSON, Defendant and Appellant.

No. 20020341-CA.

Sept. 5, 2003.

Defendant was convicted in the Fourth District Court, Provo Department, R. Taylor, J., possession of methamphetamine, and possession of paraphernalia in a drug-free zone. Defendant appealed. The Court of Appeals, Bench, J., held that search of defendant's coat and shoes exceeded the scope of an otherwise justified *Terry* frisk.

Reversed.

## West Headnotes

[1] Criminal Law ⚡1134(3)  
 110k1134(3) Most Cited Cases

[1] Criminal Law ⚡1153(1)  
 110k1153(1) Most Cited Cases

[1] Criminal Law ⚡1158(4)  
 110k1158(4) Most Cited Cases

Factual findings underlying a trial court's decision to grant or deny a motion to suppress evidence are reviewed under the deferential clearly-erroneous standard, and the legal conclusions are reviewed for correctness, with a measure of discretion given to the trial judge's application of the legal standard to the facts.

[2] Arrest ⚡63.5(9)  
 35k63.5(9) Most Cited Cases

Search of coat and shoes of defendant, who was

convicted of possession of methamphetamine and possession of paraphernalia in a drug-free zone, exceeded the scope of an otherwise justified *Terry* frisk; after defendant had been frisked and removed from premises, circumstances that justified pat-down, namely search for weapons, were no longer present when officer searched coat that was lying on floor, and thus, when officer picked up coat and patted it down for weapons, he exceeded the scope of the lawful frisk. U.S.C.A. Const.Amend. 4; U.C.A.1953, 58-37-8. .

[3] Searches and Seizures ⚡23  
 349k23 Most Cited Cases

The Fourth Amendment of the United States Constitution guarantees the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures; however, what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures. U.S.C.A. Const.Amend. 4.

[4] Arrest ⚡63.5(8)  
 35k63.5(8) Most Cited Cases

When an officer is justified in believing that an individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, the officer may conduct a pat-down or frisk to determine whether the person is in fact carrying a weapon; however, such search must be strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby. U.S.C.A. Const.Amend. 4.

[5] Arrest ⚡63.5(8)  
 35k63.5(8) Most Cited Cases

In determining what is reasonable during a pat-down search or frisk, an appellate court must ask first whether officer's action was justified at its inception, and second, whether it was reasonably related in scope to the circumstances which justified the interference in the first place. U.S.C.A.

Const.Amend. 4.

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Before Judges BENCH, DAVIS, and GREENWOOD.

### OPINION

BENCH, Judge.

¶ 1 Peterson appeals his convictions for possession of methamphetamine, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i), (4)(a), (c) (1998 & Supp.2002), and possession of paraphernalia in a drug-free zone, a class A misdemeanor, in violation of Utah Code Ann. §§ 58-37a-5 and 58-37-8(4)(a), (c) (1998 & Supp.2002). On appeal, Peterson claims that the search of his coat and shoes exceeded the scope of an otherwise justified *Terry* frisk. *See \*647Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). We agree. We therefore reverse his convictions.

### BACKGROUND

¶ 2 The facts of this case are recited in the light most favorable to the trial court's findings from the suppression hearing. *See State v. Delaney*, 869 P.2d 4, 5 (Utah Ct.App.1994).

¶ 3 On December 28, 2001, Officer Russ Billings of the Provo City Police Department received an anonymous report that adults were using methamphetamine in the presence of children at a Provo residence. Officer Billings, along with several other officers, went to the residence to perform a welfare check on the children. A woman answered the door and informed Officer Billings that her adult daughter, Dawn Webster, was the tenant. Webster came to the door shortly thereafter and, according to Officer Billings, gave consent to the officers' entry and search of her apartment.

¶ 4 Officer Billings proceeded with Webster to a bedroom, upstairs and down a short hallway, where Webster's baby was sleeping. Webster and Officer Billings had been in the bedroom for approximately three or five seconds when Peterson unexpectedly emerged from the closet wearing light clothing and no shoes. Webster screamed out to her mother asking what the mother's boyfriend was doing in Webster's bedroom. [FN1] Startled by Peterson's emergence from the closet, Officer Billings stepped back and ordered Peterson to stop, turn around, and place his hands where the officer could see them. Peterson complied and Officer Billings then handcuffed him and patted him down for weapons. Finding no weapons, Officer Billings asked another officer to escort Peterson outside.

FN1. Webster knew Peterson was in the apartment, but thought he was in the kitchen with her mother.

¶ 5 Within about sixty seconds of the pat-down, Officer Billings noticed a coat on the floor of the closet where Peterson had been standing. Officer Billings asked a child who had entered the bedroom if the coat belonged to Peterson. The child responded affirmatively. Webster confirmed that the coat belonged to Peterson, and that Peterson had been wearing it when she answered the door. Officer Billings picked up the coat, intending to take it to Peterson. For safety purposes, he patted down the pockets of the coat. In doing so, Officer Billings felt a syringe in the right pocket. Officer Billings removed the syringe, which contained a brown liquid that later tested positive for methamphetamine. Meanwhile, another officer picked up a pair of shoes within three feet of the closet. Inside one of the shoes, the officer found a baggy full of syringes. Once the syringes were removed from Peterson's coat and shoes, Officer Billings took the items to Peterson who, by then, was standing on the front porch in the "extremely cold" December weather. Peterson was then arrested for drug offenses.

¶ 6 Before trial, Peterson moved to suppress all evidence found in his coat and shoes, claiming it was obtained by an illegal search and seizure. The trial court denied Peterson's motion to suppress,

finding that the search of the coat and shoes was within the scope of a lawful *Terry* frisk. Peterson was subsequently convicted of possession of methamphetamine and paraphernalia. Peterson appeals.

#### STANDARD OF REVIEW

[1] ¶ 7 "The factual findings underlying a trial court's decision to grant or deny a motion to suppress evidence are reviewed under the deferential clearly-erroneous standard, and the legal conclusions are reviewed for correctness, with a measure of discretion given to the trial judge's application of the legal standard to the facts." *State v. Moreno*, 910 P.2d 1245, 1247 (Utah Ct.App.1996).

#### ANALYSIS

[2][3] ¶ 8 "The Fourth Amendment of the United States Constitution guarantees the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' " *State v. Lopez*, 873 P.2d 1127, 1131 (Utah 1994) \*648 (quoting U.S. Const. amend. IV). However, "what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures." *Terry v. Ohio*, 392 U.S. 1, 9, 88 S.Ct. 1868, 1873, 20 L.Ed.2d 889 (1968) (quotations and citation omitted).

[4] ¶ 9 "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 to others," the officer may conduct a pat-down or frisk "to determine whether the person is in fact carrying a weapon." *Terry*, 392 U.S. at 24, 88 S.Ct. 1868. However, such search must be strictly "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." *Id.* at 26, 88 S.Ct. 1868. Professor LaFave explains that "the limited search permitted by *Terry*, it is important to remember, is to find weapons" that might be used to assault the officer. Wayne R. LaFave, 4 *Search & Seizure Law: A Treatise on the Fourth Amendment*, § 9.5(b), at 274 (3d ed.1996). Utah courts have consistently upheld limited searches for weapons under *Terry*. In *State v. Bradford*, 839 P.2d 866 (Utah Ct.App.1992), we

stated that, under *Terry*, "when an officer reasonably believes a suspect is dangerous and may obtain immediate control of weapons, a protective search is justified." *Id.* at 870 (citation omitted). The Utah Supreme Court, in *State v. Roybal*, 716 P.2d 291 (Utah 1986), held that an officer may conduct a protective weapons search only if "a reasonably prudent [person] in the circumstances would be warranted in the belief that his [or her] safety or that of others was in danger." *Id.* at 293 (quoting *Terry*, 392 U.S. at 27, 88 S.Ct. 1868).

[5] ¶ 10 In determining what is reasonable during a pat-down search or frisk, we must ask first "whether the officer's action was justified at its inception," and second, "whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20, 88 S.Ct. 1868. Peterson concedes that the frisk of his person was justified at its inception. Therefore, we limit our analysis to the scope of the search.

¶ 11 The second prong of the *Terry* analysis asks whether the scope of the search was reasonably related to the circumstances that justified the interference. See *id.*; accord *State v. Chapman*, 921 P.2d 446, 450 (Utah 1996); *State v. Johnson*, 805 P.2d 761, 763 (Utah 1991). In other words, we must determine whether the subsequent action of searching the coat and shoes was within the scope of the frisk conducted on Peterson's person.

¶ 12 Utah courts have addressed the issue of scope in different contexts. In *Johnson*, 805 P.2d at 764, the Utah Supreme Court held that running a warrants check on a passenger in an automobile that had been properly stopped exceeded the appropriate scope of detention. Similarly, in *State v. White*, 856 P.2d 656 (Utah Ct.App.1993), we held that the police officer exceeded the scope of a *Terry* frisk when the need for a frisk had dissipated. Furthermore, in *State v. Valdez*, 2003 UT App 100, 68 P.3d 1052, we held that a police officer's request for a defendant's identification during the arrest of another person "exceeded the scope of the reasons justifying the initial detention and unnecessarily expanded its duration in scope." *Id.* at ¶ 8. In fact, the scope of the detention was "limited to ensuring that defendant had no weapon in his hands and was in no position to violently interfere with the arrest."



*Id.* at ¶ 22.

¶ 13 As in *Terry* and the above cases, the authority and scope of a frisk for weapons carried out by Officer Billings must be "narrowly drawn." *Terry*, 392 U.S. at 27, 88 S.Ct. 1868. The facts of the present case are undisputed. After Officer Billings entered the room, Peterson suddenly emerged from the closet. Fearing for his own safety and the safety of others present, Officer Billings lawfully and justifiably conducted a pat-down of Peterson's person. After ensuring that Peterson did not have a weapon, Officer Billings asked another officer to escort Peterson outside. Peterson was then removed from the room and ultimately from the premises. There then remained no reasonable expectation or apprehension that Peterson could access a weapon or would otherwise interfere with the welfare check. The circumstances \*649 that justified the pat-down, namely the search for weapons, were no longer present when Officer Billings searched the coat that was lying on the floor. Therefore, when Officer Billings picked up the coat and patted it down for weapons, he exceeded the scope of the lawful frisk. The evidence seized from the coat and shoes is therefore not admissible.

#### CONCLUSION

¶ 14 We are persuaded that the search of Peterson's coat exceeded the scope of a *Terry* frisk. The safety and weapons concerns were no longer present after Peterson had been frisked and removed from the premises. We therefore reverse the convictions.

¶ 15 WE CONCUR: JAMES Z. DAVIS and PAMELA T. GREENWOOD, Judges.

77 P.3d 646, 481 Utah Adv. Rep. 3, 2003 UT App 300

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