

2003

Utah v. Daniel J. Peterson : Brief of Petitioner

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff/Petitioner,	:	
v.	:	
DANIEL J. PETERSON,	:	Case No. 20030802-SC
Defendant/Respondent.	:	

BRIEF OF PETITIONER

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

UTAH SUPREME COURT
BRIEF

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BRIEF OF PETITIONER

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 ANN. § 78-2-2(3)(a) & -2(5) (2002).

ISSUE PRESENTED AND STANDARD OF REVIEW

Where a suspect is lawfully detained outside in extremely cold weather, does the Fourth Amendment prevent police from checking the pockets of his coat before handing it to him?

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. The trial court’s factual findings

underlying its decision to grant or deny a motion to suppress evidence are reviewed for clear error. *State v. Pena*, 869 P.2d 932, 939 n.4 (Utah 1994); *accord State v. Veteto*, 2000 UT 62, ¶ 8, 6 P.3d 1133. The trial court's conclusions of law based on those findings are reviewed for correctness, "with a measure of discretion given to the trial judge's application of the legal standard to the facts." *Pena*, 869 P.2d at 936-39; *accord Veteto*, 2000 UT 62, ¶ 8.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

U.S. CONST. Amend. 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

Defendant was charged with possession of methamphetamine in a drug-free zone, a second degree felony, in violation of UTAH CODE ANN. § 58-37-8(2)(a)(i), (4)(a), (c) (1998 & Supp. 2002), and possession of drug 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). Defendant filed a motion to suppress evidence obtained pursuant to a weapons frisk of his discarded coat and shoes. R30-23.¹ Following an evidentiary hearing on 24 January 2002, the trial court orally denied the motion:

¹The record is numbered in reverse chronological order.

The nub of this case falls on whether or not [Officer Billings] was justified in picking up that coat and checking it for weapons. . . . We expect officers to act reasonably and we, we consider whether or not they [are] reasonable by looking at the totality of the circumstances. I can only imagine [] Barney Fife conducting a search, making sure the man had no weapons, and then turning around and handing him the weapon. How dumb is that. If, if there's a reason to make certain that the man has no weapon and to remove him from danger, and then immediately as a matter of courtesy hand him a coat[,] but not check it for weapons that's, that's ludicrous.

And so my finding is that the the (sic), retrieval of the coat because of the totality of these circumstances was so closely related in time that it was reasonably related to removing [defendant] from the room, and that it was practically and reasonably necessary to simply pat the coat and make sure that he wasn't undoing what he had just done by conducting the *Terry* frisk.²

R210:52 (a copy of the oral ruling is attached in **addendum B**). The trial court subsequently clarified that defendant had not requested the coat and that it found the frisk to fall within the parameters of *Terry*: “[I]t[']s a reasonable check for weapons before he hands him the coat due to the fact that it's, it's really cold outside, the defendant is there, it's his coat[.]” R210:54.³

Thereafter, defendant was tried by a jury and convicted for the lesser-included offense of possession of methamphetamine, a third degree felony. R129. He was

²*See Terry v. Ohio*, 392 U.S. 1 (1968).

³Although not expressly referenced by the trial court, presumptively, the trial court's ruling encompassed the frisk of defendant's shoes which immediately followed the pat-down of defendant's jacket. *See* R205:21; R212:111, 166; *State v. Peterson*, 2003 UT App 300, ¶ 5. The trial court did not rule on defendant's “Motion to Submit Judgement on Warrantless Search of Shoes,” filed 25 January 2000, the day after the trial court's admissibility ruling on 24 January 2000. *See* R117. Neither party took up the trial court's invitation to prepare written findings. *See* R210:54.

convicted as charged for possession of paraphernalia in a drug-free zone, a class A misdemeanor. *Id.* The trial court imposed an indeterminate term of zero-to-five years for the felony offense and a concurrent indeterminate term of one year for the misdemeanor offense. R194-193. Defendant filed a timely notice of appeal. R198.

On direct appeal, the court of appeals reversed. *State v. Peterson*, 2003 UT App 300, ¶ 13, 77 P.3d 646 (a copy of the opinion is attached in **addendum A**). According to the court of appeals, “when Officer Billings picked up [defendant’s] coat and patted it down for weapons, he exceeded the scope of the lawful frisk[.]” because once defendant himself was frisked and taken outside, “[t]he circumstances that justified the pat-down, namely the search for weapons, were no longer present[.]” *Id.*

STATEMENT OF THE FACTS⁴

On 28 December 2001, Officer Billings of the Provo City Police Department received an anonymous report that methamphetamine was being used by injection in front of small children at Dawn Webster’s apartment. R205:6; R210:4; R212:105; *State v. Peterson*, 2003 UT App 300, ¶ 3. Officer Billings and three other officers went to the

⁴On certiorari, this Court reviews the decision of the court of appeals and applies the same standard of review applied by that court. *State v. Layman*, 1999 UT 79, ¶ 3, 985 P.2d 911. The court of appeals reviews the facts in the record in the light most favorable to the trial court’s ruling denying defendant’s motion to suppress. *State v. Delaney*, 869 P.2d 4, 5 (Utah App. 1994); *State v. Tetmyer*, 947 P.2d 1157, 1158 (Utah App. 1997). The trial court relied on the preliminary hearing transcript (*see* R210:4), in addition to evidence adduced at the suppression hearing; therefore, the State has included citations to the preliminary hearing transcript (*see* R205), along with citations to the suppression hearing (*see* R210), and trial (*see* R212) transcripts, in support of the trial court’s ruling.

apartment to perform a welfare check. R205:6-7; R210:4; R212:105; *Peterson*, 2003 UT App 300, ¶ 3. When Officer Billings knocked on the door, Dawn's mother answered. R205:18; R212:108; *Peterson*, 2003 UT App 300, ¶ 3. Dawn came to the door shortly thereafter. R205:7-8; R212:108; *Peterson*, 2003 UT App 300, ¶ 3. She consented to a search of her apartment and belongings. R205:7-8; R210:4; R212:108; *Peterson*, 2003 UT App 300, ¶ 3.

Officer Billings followed Dawn to the main bedroom, approximately 25 feet from the door. R210:5; R212:109. *Peterson*, 2003 UT App 300, ¶ 4. The bedroom was unusually dark because the shades were drawn and the window was draped with a blanket. R210:9; R212:110, 137. Dawn stepped into the room and picked up her baby from the crib, Officer Billings followed. R210:6; R212:109, 134. Dawn and Officer Billings were in the bedroom for no more than three to five seconds when defendant unexpectedly bolted from the closet, startling both Dawn and the officer. R205:7-8, 27-28; R210:6,9; *Peterson*, 2003 UT App 300, ¶ 4. Dawn "screamed out to her mother asking what the mother's boyfriend was doing in [her] bedroom"—Dawn had believed that defendant was in the kitchen with her mother. R205:33; *Peterson*, 2003 UT App 300, ¶ 4.

Although the closet doors were open, Officer Billings had not seen defendant inside. R210:6; R212:109; *Peterson*, 2003 UT App 300, ¶ 4. Defendant's rapid approach concerned Officer Billings, who reached for his sidearm. R210:9; *Peterson*, 2003 UT App 300, ¶ 4. Officer Billings also stepped back and ordered defendant to stop, turn

around, and place his hands where the officer could see them. R210:10; *Peterson*, 2003 UT App 300, ¶ 4. He then handcuffed defendant and frisked him for weapons. R210:10; R212:138; *Peterson*, 2003 UT App 300, ¶ 4. Finding no weapons on defendant's person, Officer Billings had another officer escort the barefoot and lightly dressed defendant to the front porch for safety purposes. R210:11, 14-16; R212:111; *Peterson*, 2003 UT App 300, ¶ 4.

Because it was “extremely cold,” “twenty degree weather,” Officer Billings decided to take defendant some warmer clothes. R210:37; *Peterson*, 2003 UT App 300, ¶ 5. He asked an approximately seven-year-old child also in the room if the coat defendant had been standing on belonged to him (defendant). R210:11, 13, 15, 37; R212:111-112, 138-139; *Peterson*, 2003 UT App 300, ¶ 5. The child responded affirmatively. R210:11; *Peterson*, 2003 UT App 300, ¶ 5. Dawn confirmed that the coat was defendant's—he had been wearing it “when [she] answered the door.” R205:34; *Peterson*, 2003 UT App 300, ¶ 5. When Officer Billings picked up the coat, he patted the pockets for safety purposes: “I’m not going to hand a coat with a loaded gun to somebody in handcuffs.” R205:23; *Peterson*, 2003 UT App 300, ¶ 5. The officer's frisk of defendant's coat was essentially instantaneous with the preceding frisk of defendant's person—separated by less than 60 seconds. R210:13; *Peterson*, 2003 UT App 300, ¶ 5.

In patting down the coat, Officer Billings “felt something in the pocket . . . [that] [f]elt like a syringe.” R210:11-12; *Peterson*, 2003 UT App 300, ¶ 5. Officer Billings took the syringe into his custody “so that it [could not] be used, destroyed, or used as a weapon

against any officers that were there.” R205:10; *Peterson*, 2003 UT App 300, ¶ 5. A brown liquid in the syringe was later tested and found to be methamphetamine. R212:153, 155; *Peterson*, 2003 UT App 300, ¶ 5.

Shortly after Officer Billings found the syringe, Officer Woodall retrieved defendant’s shoes, not more than three feet from the closet. R205:21; R212:111, 166; *Peterson*, 2003 UT App 300, ¶ 5. In doing so, Officer Woodall saw a baggy filled with syringes inside one of the shoes. R212:119-120, 167-168; *Peterson*, 2003 UT App 300, ¶ 5. Once the syringes were removed, Officer Billings took the jacket and shoes to defendant, who was standing on the front porch in “20 degree weather,” and placed him under arrest. R205:24; R210:21, 37; *Peterson*, 2003 UT App 300, ¶ 5.

SUMMARY OF THE ARGUMENT

There is no question that defendant was lawfully detained out-of-doors after he surprised Dawn and police by bolting out of a closet in a dark bedroom while police conducted a welfare check on Dawn’s children. The only issue is whether the weapons frisk of defendant’s discarded coat and shoes properly fell within the scope of the indisputably justified frisk of his person, as found by the trial court. The trial court’s ruling is well-supported and the court of appeals’ reversal is inconsistent with relevant Fourth Amendment jurisprudence. Indeed, the court of appeals’ holding, that the officer safety justification for frisking defendant’s jacket was “no longer present” once he was removed outside the apartment, is emphatically unreasonable, given that police properly

determined to hand defendant his jacket while he was detained in “extremely cold,” “20 degree weather.”

ARGUMENT

WHERE A SUSPECT IS LAWFULLY DETAINED OUTSIDE IN EXTREMELY COLD WEATHER, THE FOURTH AMENDMENT DOES NOT PREVENT POLICE FROM CHECKING THE POCKETS OF HIS COAT BEFORE HANDING IT TO HIM

The trial court ruled that the frisk of defendant’s discarded jacket fell within the scope of the lawful *Terry* frisk of defendant’s person. R210:52, 54. According to the trial court, it would have been “ludicrous” for Officer Billings *not* to have checked defendant’s jacket for weapons before handing it to him “as a matter of courtesy” while he was lawfully detained in “really cold” weather, and because it was “so closely related in time”—under 60 seconds—to the valid frisk of defendant’s person. *Id.* See also *State v. Peterson*, 2003 UT App 300, ¶¶ 6, 13, 77 P.3d 646. The court of appeals reversed, holding that “when Officer Billings picked up [defendant’s] coat and patted it down for weapons, he exceeded the scope of the lawful frisk[.]” because once defendant was frisked and taken outside, “[t]he circumstances that justified the pat-down, namely the search for weapons, were no longer present[.]” *Id.*

The court of appeals’ holding overlooks the trial court’s finding that Officer Billings reasonably sought, “as a matter of courtesy,” to provide defendant his jacket during his lawful detention out-of-doors in “really cold” weather. See R210:52, 54. The court of appeals’ holding thus forces Utah law enforcement to choose between leaving a

lawfully detained suspect outside in frigid conditions without proper clothing and handing him a coat that may contain a weapon. Because the Fourth Amendment does not mandate that humane law enforcement make this uncomfortable choice, the court of appeals' decision should be overruled.

This Court recently reviewed the origin and limits of weapons frisks, observing that, under *Terry*, police “may perform a protective frisk pursuant to a lawful stop when the officer reasonably believes a person is ‘armed and presently dangerous to the officer or others.’” *State v. Warren*, 2003 UT 36, ¶ 13, 78 P.3d 590 (quoting *Terry*, 392 U.S. at 24). The initial detention of a suspect must, of course, be for a “valid reason,” and “the officer’s subsequent actions must be ‘reasonably related in scope to the circumstances’ justifying the stop” or detention. *Id.* (quoting *Terry*, 392 U.S. at 19-20). This Court reiterated that “[t]he sole purpose for allowing the frisk is to protect the officer and other prospective victims by neutralizing potential weapons. ‘If a protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed.’” *Id.* (case citations omitted). *See also* UTAH CODE ANN. §§ 77-7-16, 77-7-17 (2003) (codifying authority for weapons frisks).

Here, the validity of the *Terry* frisk of defendant’s person is undisputed. *See Peterson*, 2003 UT App 300, ¶ 13. Therefore, the only question is whether the contemporaneous frisk of defendant’s jacket was “‘reasonably related in scope to the circumstances’” justifying the frisk of his person. *Warren*, 2003 UT 36, ¶ 13 (quoting

Terry, 392 U.S. at 19-20). Pertinent Fourth Amendment jurisprudence regarding the scope of a legal weapons frisk, demonstrates that it was.

Terry's progeny has gradually extended the scope of permissible police conduct. The United States Supreme Court has clarified that *Terry*, "need not be read as restricting the preventative search to the person of the detained suspect." *Michigan v. Long*, 463 U.S. 1032, 1047 (1983). Police with reasonable suspicion that a suspect is dangerous and "may gain immediate control of weapons" can search a vehicle passenger compartment for weapons. *Id.* at 1049-1050 (quoting *Terry*, 392 U.S. at 21). This extension of *Terry* recognizes that "roadside encounters between police and suspects are especially hazardous," and that "[i]f a suspect is 'dangerous,' he is no less dangerous simply because he is not arrested." *Id.* at 1050. Indeed, "if the suspect is not placed under arrest, he will be permitted to reenter his automobile, and he will then have access to any weapons inside. Or, as [in *Long*], 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 (citation omitted).

Both this Court and the court of appeals recognize that *Long* extended *Terry* to authorize searches of a vehicle passenger compartment for weapons, "if the officer has a reasonable and 'articulable suspicion that the suspect is potentially dangerous.'" *See State v. Schlosser*, 774 P.2d 1132, 1135 (Utah 1989) (quoting *Long*, 463 U.S. at 1052-55 n. 16). *See also State v. Bradford*, 839 P.2d 866, 869 (Utah App. 1992) (recognizing that "the fact, taken in isolation, that a suspect is outside a vehicle while an officer is

conducting a search does not overcome an officer's reasonable fear because the suspect may 'break away from police control and retrieve a weapon from [the] automobile'" (quoting *Long*, 463 U.S. at 1051).

The court of appeals and other courts, both pre- and post-*Long*, have extended *Terry* to uphold weapons frisks of, among other things, a diaper bag, jacket, duffel bag, motel room, knapsack, and paper bag. See, e.g., *State v. Harrison*, 805 P.2d 769, 785 (Utah App. 1991) (diaper bag); *United States v. Johnson*, 637 F.2d 532, 534-535 (8th Cir. 1980) (duffel bag); *State v. Vasquez*, 807 P.2d 520, 523 (Ariz. 1991) (jacket); *Servis v. Commonwealth*, 371 S.E.2d 156, 160-161 (Va. App. 1988) (motel room); *Jordan v. State*, 531 A.2d 1028, 1031-1032 (Md. App. 1987) (paper bag); *State v. Ortiz*, 683 P.2d 822, 828 (Haw. 1984) (knapsack). One case predating *Terry* by three months, and *Long* by fifteen years, upheld a weapons frisk of unworn clothing. See *People v. Bowles*, 289 N.Y.S.2d 526, 528 (1968). The essential recognition in these cases is that "there may exist circumstances in which the officer might 'reasonably suspect the possibility of harm if he returns [property] unexamined' and that in such circumstances the officer must be allowed to 'inspect the interior of the item before returning it.'" See 4 W. LaFare, *Search & Seizure*, § 9.5(e), p. 284 (3rd ed. 1996) (quoting Model Rules for Law Enforcement, Stop and Frisk, rule 605 (1974)).

Like the foregoing authorities, the case at bar presents circumstances where "the officer might 'reasonably suspect the possibility of harm if he returns [property] unexamined.'" *Id.* Indeed, *Long* recognizes that a roadside suspect continues to be

dangerous even after being removed from his vehicle precisely because the suspect “will be permitted to reenter his automobile” at the conclusion of the investigation, or may even be “permitted to reenter . . . before the *Terry* investigation is over” and gain “access to any weapons inside.” *Long*, 463 U.S. at 1051-1052. In this case, defendant was going to be handed his coat—given the “20 degree weather”—and could consequently access any weapon therein. R210:15, 21, 37, 53, 54. Given this unique circumstance, the safety concerns that allow police to check a vehicle passenger compartment for weapons before allowing a suspect to reenter likewise allow an officer to check a dangerous suspect’s clothing before handing it to him during a lawful detention outside in “really cold” weather. *Id.* See *Long*, 463 U.S. at 1051-1052.

Rather than analogize to—or even acknowledge—*Long* and the other pertinent scope-of-frisk cases cited in the State’s Brief of Appellee, at pp. 8-10, 13, the court of appeals relied on two non-frisk cases and one case dealing with an insufficient justification for a weapons frisk, but not its scope. See *Peterson*, 2003 UT App 300, ¶¶ 12-13 (citing *State v. Johnson*, 805 P.2d 761 (Utah 1991); *State v. Valdez*, 2003 UT App 100, 68 P.3d 1052); and *State v. White*, 856 P.2d 656 (Utah App. 1993)). Notably, none of these cases involved an ongoing safety concern. Thus, the court of appeals overlooked the continuing danger inherent on these facts—that while lawfully detained in frigid weather, defendant would be handed his jacket with a weapon concealed therein. See R210:52, 54.

Contrary to the court of appeals holding, Officer Billings's pat-down of defendant's coat was eminently reasonable police action. *Id.* Indeed, it was even less intrusive than the frisks upheld in *Terry* or *Long*. It was less personally invasive than the "severe, though brief, intrusion upon cherished personal security," upheld in *Terry*, 392 U.S. at 24-25, because defendant was not wearing his jacket at the time it was frisked. *See State v. Schultz*, 491 N.E.2d 735, 739 (Ohio App. 1985) (observing that search of an unworn coat "[was] a significantly less intrusive official act than a search of the person or a *Terry*-type patdown"). And, it was both less intrusive and less expansive than the vehicle passenger compartment search for weapons authorized in *Long* because police frisked (as opposed to searched) only the specific items of clothing (as opposed to the whole of a vehicle passenger compartment) defendant discarded before bolting from the bedroom closet.

The court of appeals' holding, on the other hand, that the dangerous circumstances justifying the frisk "were no longer present" once defendant was removed from the apartment, is hyper-technical. *See Peterson*, 2003 UT App 300, ¶ 13. The court of appeals' decision forces upon police officers a Hobson's choice: leave a lawfully detained suspect outside in frigid weather without proper clothing, or risk handing the suspect a coat that may contain a weapon. The United States Supreme Court eschews bright line rules like the "removal rule" adopted by the court of appeals in this case: "Much as a 'bright line' rule would be desirable, in evaluating whether an investigative detention is

unreasonable, common sense and ordinary human experience must govern over rigid criteria.” *United States v. Sharpe*, 470 U.S. 683, 685 (1985).

Moreover, as previously recognized by this Court, “[t]he touchstone of [an] analysis under the Fourth Amendment is always ‘the reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security.’” *Warren*, 2003 UT 36, ¶ 31 (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977) (quoting *Terry*, 392 U.S. at 19)). *See also Dunaway v. New York*, 442 U.S. 200, 219 (1979) (White, J., concurring) (“[T]he key principle of the Fourth Amendment is reasonableness—the balancing of competing interests”). “The Fourth Amendment is not, . . . a guarantee against *all* searches and seizures, but only against *unreasonable* searches and seizures.” *Sharpe*, 470 U.S. at 682 (emphasis in original). Accordingly, reviewing courts must be wary of

allow[ing] the theoretical, sanitized world of [their] imagination to replace the dangerous and complex world that policemen face every day. What constitutes ‘reasonable’ action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.

Smith v. Freland, 954 F.2d 343, 347 (6th Cir. 1992).

Thus, while “the protection of the public might, in the abstract, have been accomplished by ‘less intrusive’ means,” given defendant’s lack of proper clothing for the frigid weather, the humane decision to hand him his coat can hardly be characterized as unreasonable. *See Sharpe*, 470 U.S. at 686-687 (quoting *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973) (“The fact that the protection of the public might, in the abstract, have

been accomplished by ‘less intrusive’ means does not, by itself, render the search unreasonable”).

Finally, for the same reasons the frisk of defendant’s jacket was valid, the subsequent frisk of his shoes was also valid. *See Peterson*, 2003 UT App 300, ¶ 5. Although unexplained by either the trial court or the court of appeals, this is so because it necessarily follows that if the jacket frisk yielding meth syringes was justified, the frisk of defendant’s shoes immediately thereafter was at least as justified, if not more so, because it was preceded by probable cause to arrest. *See* R28-27, R205:21. “A search is not invalid despite the fact that it precedes a formal arrest, so long as the arrest and search are substantially contemporaneous and probable cause to effect the arrest exists independent of the evidence seized in the search.” *See State v. Ayala*, 762 P.2d 1107, 1111-1112 (Utah App. 1988). *See also Bailey v. Bayles*, 2002 UT 58, ¶¶ 10-13, 52 P.3d 1158 (“[A]n appellate court *may* affirm the judgment appealed from it if is sustainable on any legal ground or theory *apparent on the record*.” (quotation omitted) (emphasis in original)).

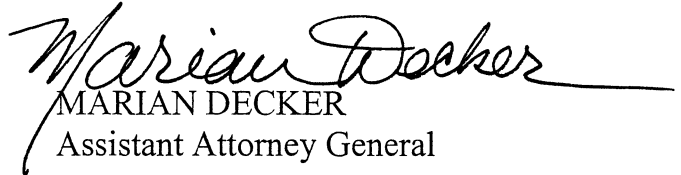
CONCLUSION

If the court of appeals’ hyper-technical “removal rule” is left intact, it will remain unclear to law enforcement and lower courts when and under what circumstances the Fourth Amendment allows protective frisks of a lawfully detained suspect’s personal items which police seek to hand a dangerous suspect during or immediately after a valid

detention. This Court should therefore reverse the court of appeals' decision and affirm the trial court's admissibility ruling.

RESPECTFULLY SUBMITTED on 23rd April 2004

MARK L. SHURTLEFF
Utah Attorney General

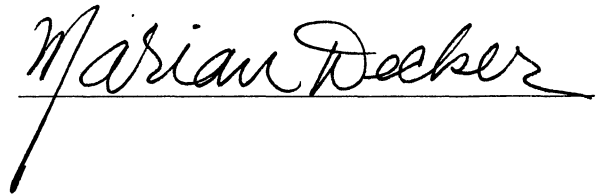

MARIAN DECKER
Assistant Attorney General

CERTIFICATE OF MAILING

I certify that on 23rd April 2004, I mailed, postage prepaid, two copies of this Brief of Petitioner to the following:

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Addendum A

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.

*646 Margaret P. Lindsay, Aldrich Nelson Weight

& Esplin, Provo, for Appellant.

Mark L. Shurtleff, Attorney Generals Office and
Marian Decker, Assistant Attorney General, Salt
Lake City, for Appellee.

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

END OF DOCUMENT

Addendum B

1 He's still securing the area, it's still a Terry frisk.

2 And the state would ask that you rule that way,
3 Your Honor. Thank you.

4 COURT'S RULING

5 THE JUDGE: All right. Thank you.

6 Well, these are interesting facts and I think I
7 need to, I need to make some factual findings before I rule
8 on the law.

9 As I see the evidence and as I understand the
10 evidence this is, this is how I find it for the purposes of
11 this hearing. The officers had a report of, and I can only
12 take it as anonymous because it was never described, it was
13 apparently dispatched so we don't know where the report came
14 from. But the information they were given was that there was
15 meth, methamphetamine possibly being used by injection, but
16 at least being used in front of children in the apartment,
17 and that they were going to the apartment for the purpose of
18 determining if children were in danger because of meth use in
19 their presence.

20 The officer testified from his experience that when
21 there is suspected drug use in a residence or in a situation
22 like that that there's a heightened amount of danger, that he
23 goes into it with a, a raised level of apprehension and
24 concern.

25 He knocked on the door. It was answered by an

1 older lady and then who was soon joined by a younger lady who
2 was apparently the tenant of the home, she testified at the
3 preliminary hearing.

4 The officer entered the apartment, walked through
5 the apartment, up some stairs, down a hall, around a turn,
6 down a hall, and into a bedroom. It was a back bedroom, it
7 was, there was a baby in the bedroom in the crib. The room
8 was unusually dark, darker than just from turning off the
9 lights, the shades were drawn and there were additional
10 blankets or sheets or something put up to make the room
11 darker than normal. The mother stepped into the room to
12 attend to the baby. It had been explained to the mother that
13 the concern was whether or not drugs had been used in the
14 room. The officer followed the mother into the room several
15 feet, several steps, I don't recall which. But he had
16 clearly entered the room, had not at that point noticed the
17 defendant, had been there for a couple of seconds, briefly
18 entered the room.

19 At that point the defendant came from the closet.
20 The closet, as I understand it the doors were not closed but
21 the defendant had not been seen. Whether because of the way
22 he was positioned in the closet or because it was dark, it
23 wasn't made clear, but he hadn't been noticed. He came from
24 the area of the closet quickly.

25 The mother was surprised. Her testimony was, and

1 I'm looking at page 33 of the transcript of the preliminary
2 hearing, page 33 line 14, the question was... Well, starting
3 at line 11. Well starting at the beginning of the page.

4 The question was:

5 Q. "Were you in the room when Mr. Peterson
6 came from out of the closet?

7 A. Yes.

8 Q. Did that surprise you?

9 A. Yes.

10 Q. Why?

11 A. I thought he was still in the kitchen
12 with my mother.

13 Q. Where was he when the officers arrived?

14 A. In the kitchen.

15 Q. He was in the kitchen? Do you know what
16 he had, did you know that he had then
17 gone and hid in the closet?

18 A. No, I didn't know where he went.

19 Q. When you saw him go out of the closet
20 what did you exclaim?

21 A. I screaming out my mother and"...

22 And I said, "I'm sorry"?

23 The witness said:

24 A. "I screaming out my mom and asked her
25 why her boyfriend was in my room."

1 So the mother was startled, was surprised and was
2 concerned that he had somehow gotten to the, gotten to the
3 room. So she was frightened. The officer was frightened,
4 a sudden movement.

5 What happened next is that the officer stopped him,
6 put up his hands, whether he spoke to him or whether he
7 physically stopped him, he stopped him, turned him around, he
8 did a frisk and had him removed from the room. And then
9 within 60 seconds later, I think at the outside it was
10 within, within a minute, within 60 seconds or a little less
11 he, he sees the coat. He says is this his coat? And a seven
12 year old child, a girl says yes, that's his coat. And he
13 feels the coat, feels the syringe, and then took the coat out
14 to him and found that he had been taken out to the front
15 porch. Those are the facts as I understand them.

16 I'm, I'm really uncomfortable applying the arrest
17 and search doctrine in cases. Those, those cases, Chimmel
18 (phonetic) was an automobile stop, and most of those cases
19 arise from stops on the freeway or stops of vehicles. And,
20 and it's very plain that the court is making a bright line so
21 that officers don't have to make those judgment calls, can I
22 search, can I not search. We don't want them, for instance,
23 taking a defendant out of a car and making him stand by the
24 side of the road to justify their search, when it would be
25 simply safer to put him in the patrol car and secure the

1 situation before you do a search.

2 And in any one of those cases that I'm familiar
3 with, a Terry frisk of his car is, is really a stretch.
4 Usually what it is is that the officer would have the right
5 to search the car, they have some probable cause, they have
6 some suspicion that justifies a search of the car if the
7 defendant is there. And the courts have said you don't have
8 to leave him there because that's dumb and it's not safe by
9 the side of the road. And there are all these circumstances
10 that have to do with automobiles and roadways for officer
11 safety. None of them apply. This is a house.

12 The question for me and the totality of the
13 circumstances, the initial frisk was justified, that's the
14 first question. And I find that it was. We've got a
15 heightened, a heightened concern because of potential drug
16 use, we've got a baby in the room, we've got a darkened room,
17 we've got a person who is by all accounts surprisingly in the
18 room, certainly to the mother, to the officer, who bolts out,
19 comes quickly. The officer is justified in that totality of
20 circumstances being concerned about his person. And
21 stopping the defendant, conducting a Terry frisk and removing
22 him from the room is completely consistent with the totality
23 of the circumstances as I see it. He was there to remove
24 potential drug use from babies. And, and while he hasn't,
25 he doesn't, doesn't have proof of drug use he has a situation

1 that's a concern to the mother, obviously, she didn't expect
2 this man to be in the room. And, and we've got a sudden
3 movement. The Terry frisk and the action to protect his
4 security is absolutely justified. Remove him from the
5 room.

6 The nub of this case falls on whether or not he was
7 justified in picking up that coat and checking it for
8 weapons. We don't... We expect officers to act reasonably
9 and we, we consider whether or not they're reasonable by
10 looking at the totality of the circumstances. I can only
11 imagine (short inaudible) Barney Fife conducting a search,
12 making sure the man had no weapons, and then turning around
13 and handing him the weapon. How dumb is that. If, if
14 there's a reason to make certain that the man has no weapon
15 and to remove him from danger, and then immediately as a
16 matter of courtesy hand him a coat but not check it for
17 weapons that's, that's ludicrous.

18 And so my finding is that the, the retrieval of the
19 coat because of the totality of these circumstances was so
20 closely related in time that it was reasonably related to
21 removing him from the room, and that it was practically and
22 reasonably necessary to simply pat the coat and make sure
23 that he wasn't undoing what he had just done by conducting
24 the Terry frisk.

25 Therefore, I deny the motion.

1 MR. ELDRIDGE: Your Honor may I, may I make two
2 additional points?

3 THE JUDGE: No. I've ruled.

4 MR. ELDRIDGE: May I point you to another case?

5 THE JUDGE: Save it for the court of appeals.
6 You've made your argument, I've ruled. The motion is
7 denied.

8 MR. EASTON: Thank you, Your Honor.

9 THE JUDGE: If you wish to prepare findings I'll
10 be happy to consider them. But I'm, I'm not going to
11 consider additional argument, Counsel. I've ruled.

12 MR. ELDRIDGE: Well, I'd like to point the case, to
13 the State vs. Beavers which indicates--

14 THE JUDGE: Well--

15 MR. ELDRIDGE: --that if there's an exigency--

16 THE JUDGE: Counsel--

17 MR. ELDRIDGE: Created by the police that--

18 THE JUDGE: Counsel, I have ruled.

19 MR. ELDRIDGE: Okay. Now I would, I would make an
20 additional motion, Your Honor, for the Court to reconsider
21 its ruling based on State vs. Beavers, and I've got that case
22 here if you need it.

23 THE JUDGE: I'm very familiar with State vs.
24 Beavers. That wasn't a (inaudible word) search, and I
25 understand the circumstances of the case. But in my view the

1 totality of the circumstances there and here are different.

2 MR. ELDRIDGE: And may I, may I ask so the ruling
3 of the Court is that the search of the coat falls under the
4 Terry frisk doctrine?

5 THE JUDGE: Yes.

6 MR. ELDRIDGE: Okay.

7 THE JUDGE: Yes. That it's, it's a reasonable
8 check for weapons before he hands him the coat due to the
9 fact that it's, it's really cold outside, the defendant is
10 there, it's his coat, he removes the coat with the--

11 MR. ELDRIDGE: May I ask the Court to make an
12 amendment to their findings that, and I think it's supported
13 by the state, by the testimony of Officer Billings, that
14 Mr. Peterson never asked for the coat?

15 MR. EASTON: I think that's in the record, Your
16 Honor.

17 THE JUDGE: That's in the record. What I will
18 tell you to do because I know that this is a potential basis
19 for appeal, it's critical to the case, either of you or both
20 of you prepare findings. If you can come to an agreement on
21 the findings or one of you wants to prepare them and submit
22 them, I'll be happy to look at the findings and sign them so
23 you can have your complete record. I think you understand
24 it.

25 We're set for trial next Monday. Are there other

1 issues we can or need to address before the trial?

2 MR. EASTON: I believe in our conference call the
3 other day it was unclear based after the determination of
4 this motion whether it would still be a jury trial.

5 THE JUDGE: It is unless somebody asks me to waive
6 the jury or asks to waive the jury and--

7 MR. ELDRIDGE: Your Honor, if I could have a few
8 minutes to talk with Mr. Easton--

9 THE JUDGE: Certainly.

10 MR. ELDRIDGE: -- and my client Mr. Peterson, we
11 might have some work to do on that.

12 THE JUDGE: We'll take a short recess for five
13 minutes or so. Let me know if you need to come back.

14 WHEREUPON, the hearing was concluded.

15 =====

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