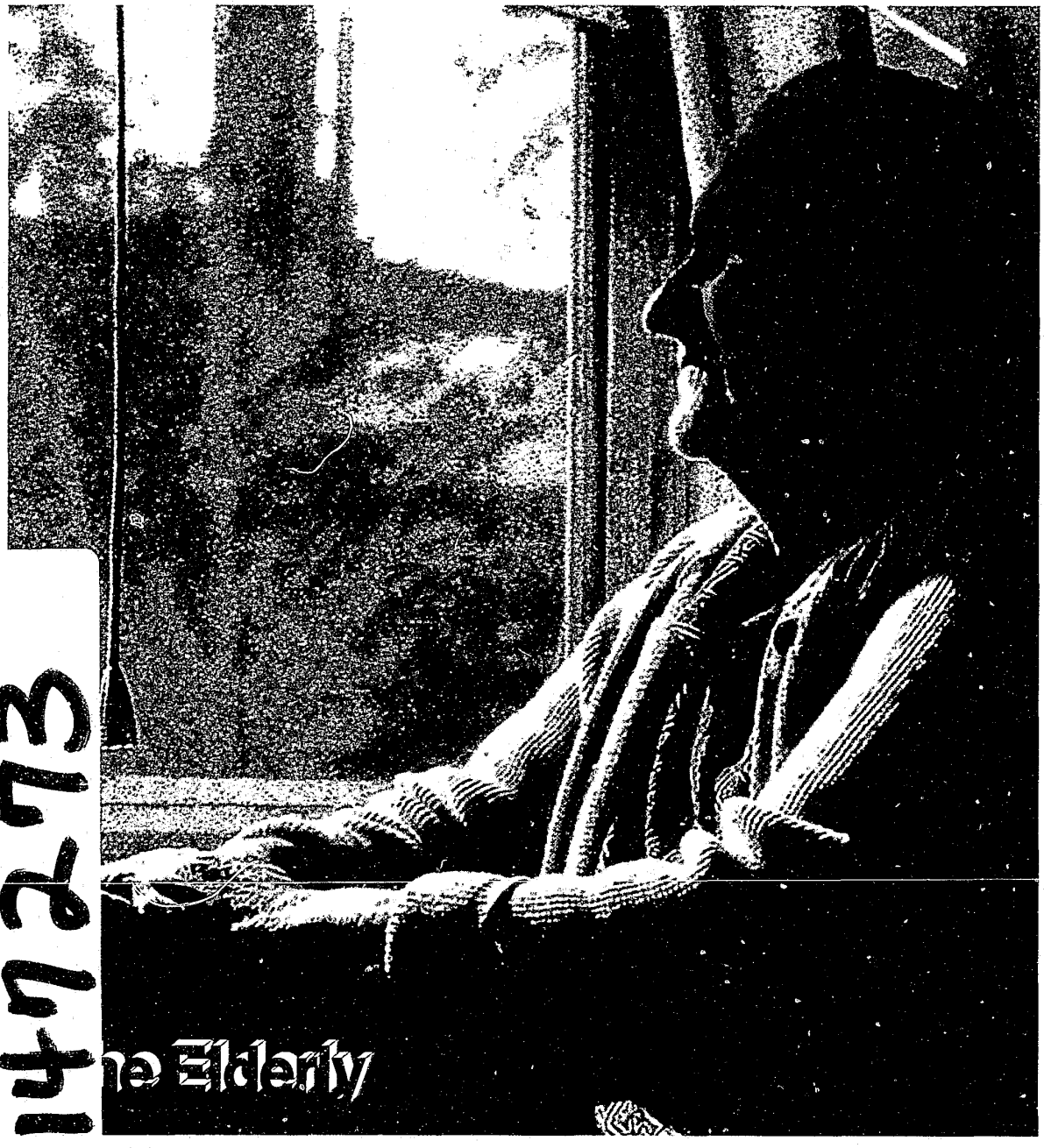

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The "Plain Feel" Doctrine

By A. LOUIS DiPIETRO, J.D.

Imagine that while on routine patrol in a marked squad car, you and your partner observe a 23-year-old man walking out of an apartment building that you consider to be a notorious "crack house." Your perception stems from the number of complaints of drug sales in the building's hallways, which you previously investigated, as well as your prior execution of several search warrants on the premises.

The man begins walking toward you, but upon spotting the patrol car and making eye contact, he abruptly halts and begins to walk in the opposite direction. Suddenly, he turns and enters an alley on the other side of the apartment building. Now, your suspicions are aroused.

You follow the man into the alley, where he complies with your command to stop. Then, based on a reasonable fear that he could be armed, you conduct a patdown search for weapons. Although no weapon is found, you do feel a small lump in the front pocket of his nylon jacket. When you examine it with your fingers, the lump slides and feels like crack cocaine in cellophane. You then reach into the man's pocket and retrieve a small plastic bag that contains 1/5 gram of crack cocaine. Is the seizure of the cocaine lawful under the so-called "plain feel" doctrine?

Based on these very facts, the Supreme Court recently answered "no" to that question in *Minnesota v. Dickerson*.[1] Yet, while the Court invalidated the search that occurred in that particular case, all nine Justices nevertheless agreed that under certain conditions, police may lawfully seize nonthreatening contraband detected through the sense of touch during a protective patdown search.[2]

Officers facing similar circumstances need to understand why the

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> ***"...under certain conditions, police may lawfully seize nonthreatening contraband detected through the sense of touch during a protective patdown search."***

Court concluded that the search in *Dickerson* violated the fourth amendment. The following four questions illustrate the reasoning process the Court used to resolve this issue and are instructive for guiding officer conduct.

1. Does the officer have articulable facts demonstrating an objectively reasonable suspicion that the person is presently armed with a potential weapon?
2. Is the protective frisk conducted by the officer strictly limited in scope to actions necessary for the discovery of weapons?
3. Does the officer reasonably believe that an object detected during the limited frisk could be a weapon?
4. During the limited frisk for weapons, does the officer see and/or feel an object that is immediately recognized as evidence or contraband?

This article examines court decisions involving investigative scenarios that raise these questions and discusses various investigative responses permitted by the fourth amendment.

Justifying a Frisk—Articulable Reasonable Suspicion

In order to justify a frisk for weapons under the Supreme Court's decision in *Terry* v. *Ohio*,[3] officers must be able to clearly articulate facts that demonstrate an objectively reasonable suspicion that the defendant is presently armed with a potential instrument of assault.[4] Absent such facts, the evidence seized pursuant to the patdown will be suppressed.[5] In cases where a detainee is suspected of engaging in a crime like drug trafficking or where past police experience suggests a high likelihood that the suspect is armed, some courts take judicial notice that officers can reasonably suspect such suspects to be armed and dangerous, thereby justifying the frisk.[6]

Frisks Strictly Limited in Scope

A protective frisk is not designed to discover evidence of crime. Rather, it is strictly limited to those actions necessary to discover weapons so that officers can pursue investigations without fear of violence. Once they determine by touch that a particular object is not a weapon, officers cannot continue to feel that object.

When a protective frisk goes beyond what is necessary to determine if a suspect is armed, it is no longer a valid *Terry* frisk.[7] Courts carefully scrutinize the scope of a frisk to determine whether an officer's stated concern for safety was legitimate or a pretext to seize evidence.

For example, in *United States* v. *Winter*,[8] a Federal district court suppressed $12,500 in serialized currency seized during a *Terry* frisk — $9,000 of which had been previously furnished to a confidential informant to buy drugs. At the suppression hearing, the trooper testified that one purpose for conducting the patdown frisk of the defendant was to find the serialized currency. He also testified that he decided beforehand to seize the money wherever it was.

Although the trooper stated he was concerned about a weapon, he admitted that when he took a brown bag out of the defendant's jacket, he "obviously" knew the bag did not contain a weapon. Whatever else the bulge might be, the trooper knew that it was not a weapon.

The court concluded that the trooper should have terminated the frisk as soon as he ascertained that the defendant was not carrying any

weapons and that the seizure and search of the bag was illegal. The court also reaffirmed that the sole justification for a frisk is to protect the officer and others and that the scope of a frisk does not include the right to search for evidence to prevent its disappearance or destruction.[9] Therefore, once an officer determines by the sense of touch that an object is not a weapon, the frisk must stop.

Justifying a Seizure—Reasonable Belief Object Could Be a Weapon

If, during a lawful limited patdown for weapons, officers feel an object that they reasonably believe could be a weapon, they may seize it.[10] Even if the object turns out in retrospect to be contraband or evidence, its seizure does not offend the fourth amendment, as long as the officers' belief that it was a weapon is objectively reasonable.

In determining what objects might be a weapon, consideration must be given to the setting of the particular case.[11] In *United States* v. *El-Gabrowny*,[12] officers conducting a lawful patdown frisk of a suspect in the bombing of the World Trade Center felt a rectangular object, which they thought could be plastic explosives. Before the officers could remove the object, the suspect struck the officers who were controlling him. After securing the defendant, the officers removed the rectangular object from the suspect's pocket.

Although the rectangular object turned out not to be explosives, a Federal district court ruled that the officers had two independent legal justifications for seizing the object. First, it was reasonable for the officers to fear that the rectangular object was a potential source of danger and seize it under the rationale of a *Terry* frisk. Second, once the suspect assaulted the officers, it was lawful to arrest him for that assault and to then conduct a full search of his person incident to that arrest. Therefore, the fruits of a lawful frisk can, alone or together with other suspicious circumstances, ripen into probable cause to arrest, thereby justifying a more extensive search incident to arrest.

> ***"...once an officer determines by the sense of touch that an object is not a weapon, the frisk must stop."***

In another example, a U.S. Court of Appeals reviewed a case wherein officers saw a noticeable bulge in the defendant's pants pocket and had other facts suggesting that he had been involved in an armed robbery.[13] During the ensuing patdown for weapons, one of the officers recognized the outline of a gun and pulled a loaded pistol out of the defendant's pocket. The officer placed the defendant under arrest for carrying a concealed firearm and then searched him incident to the arrest, finding cocaine in the other pants pocket. Although the officer did not immediately recognize the cocaine during the initial patdown, which would have been necessary to justify its seizure under the "plain feel" doctrine, the court nonetheless held the contraband was reasonably seized incident to a lawful arrest.

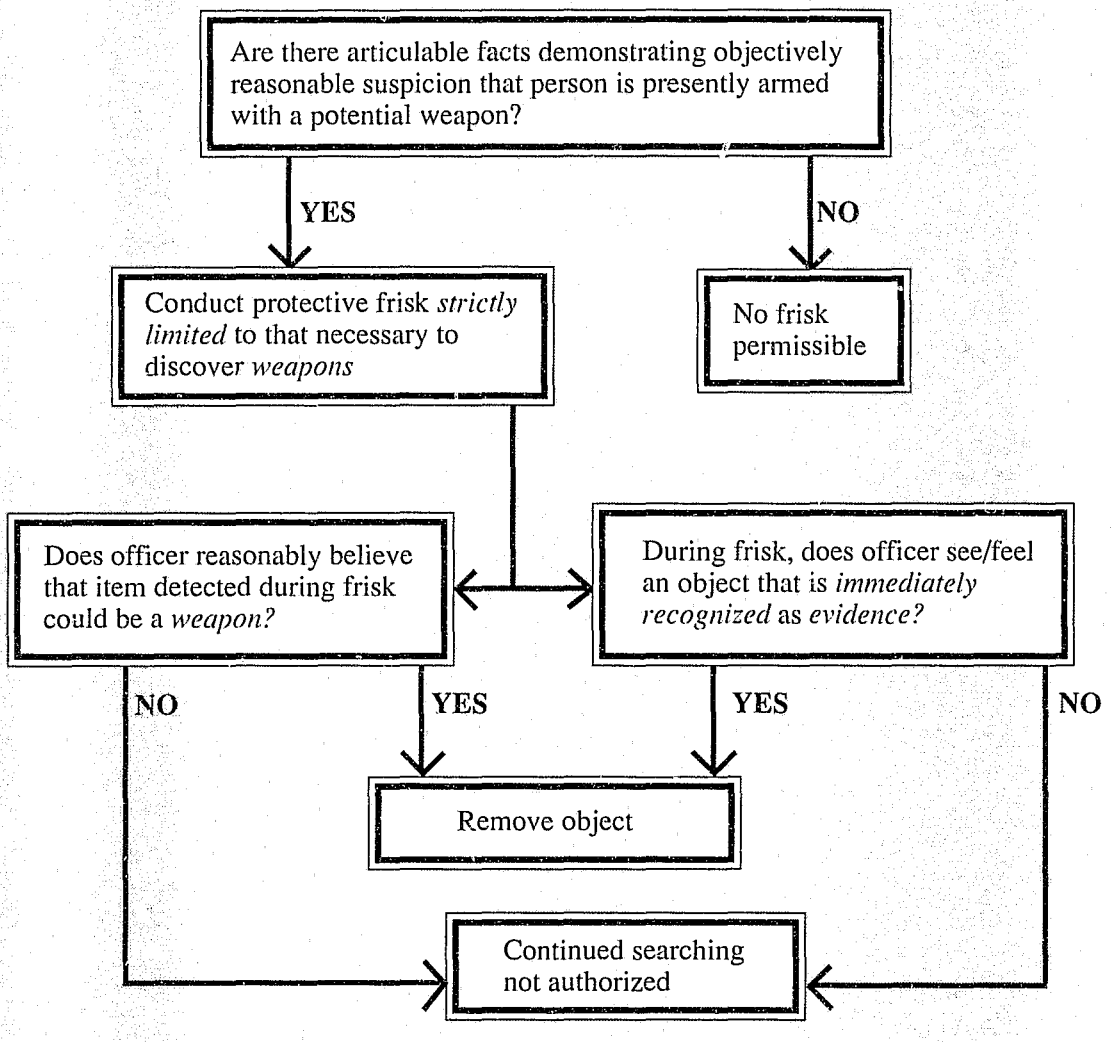
"Plain Feel" Seizures of Immediately Recognizable Evidence

Totally separate from the *Terry* frisk rationale, officers may have an independent justification to seize objects under a variation of the Plain View Doctrine,[14] which is often referred to as the "plain feel" doctrine when applied to tactile searches. Under this rationale, if officers conducting a lawful weapons frisk feel an object that they immediately recognize as evidence or contraband, they may lawfully seize that object under this so-called "plain feel" doctrine.

To be seizable, the incriminating nature of the evidence must be immediately apparent to the searching officer to the level of probable cause.[15] A recent decision by a Pennsylvania Superior court illustrates the importance of officers being able to articulate in detail the specific nature and basis for their perceptions. In that case, an officer's testimony concerning his frisk of a suspect in a drug case was paraphrased as follows:

> "[He] felt something 'crunchy' or 'granular' in Johnson's crotch that did not feel like anything that, physiologically, was supposed to be there....that 50 times over the last four years he had felt something 'crunchy' or 'granular' during a frisk of a crotch area that turned out to

Frisks: To Seize or Not to Seize



> be a controlled substance.... that in conducting frisks he 'feel[s] a lot of guys' crotches' and that what he felt on this occasion 'did not feel like anyone's testicle.' "[16]

Based on the officer's detailed explanation for his "plain feel" seizure, the court held that his tactile impression of the consistency and location of the package, combined with his years of experience and surrounding circumstances, made the illegal nature of the object immediately apparent, thereby justifying its seizure.

The importance of officers' being able to clearly articulate probable cause for believing the object is or contains evidence or contraband is illustrated by the decision in *United States* v. *Ross*,[17] where a Federal district court found that the incriminating character of the suspected contraband was not "immediately apparent." In that case, an officer conducted a patdown search

of a suspected drug dealer and felt a matchbox in the defendant's groin area, which felt hollow when the officer hit it. The officer testified that he suspected the matchbox contained contraband because drug traffickers commonly carry contraband in matchboxes. The officer also stated that in his years of experience, he had found contraband concealed in small matchboxes tucked in the groin area 50 to 100 times.

Although the officer testified that he believed the item to be a matchbox, the court nonetheless held that his suspicion that the matchbox contained contraband did not satisfy the "immediately apparent" requirement.[18] The court explained that the result might have been different if the defendant had been carrying the cocaine in a plastic baggy in his pelvic area through which the contours or mass of contraband could be sensed by the officer conducting the frisk. In *Ross,* the court concluded that the fourth amendment required the officer to have probable cause to believe the matchbox contained contraband *before* seizing it.

Because the officer's suspicion that the matchbox contained cocaine did not rise to the level of probable cause, his removal of the box to verify his suspicion exceeded the legitimate bounds of a "plain feel" seizure. Where officers lack probable cause to believe that an object they feel during a frisk is contraband or evidence, because its incriminating nature is not "immediately apparent" without conducting some further search of the object, the "plain feel" doctrine does not permit either its seizure or a further search of the object.[19]

Conclusion

The Supreme Court decision in *Dickerson* discussed at the beginning of this article ruled that the patdown frisk of the suspect's jacket was justified because the officer had a reasonable suspicion that he was armed. The scope of that frisk would permit the officer to place his hands on the suspect's jacket and feel the lump in the pocket. However, once the officer determined the object was not a weapon, no further search was permissible, unless the officer had probable cause to believe it was evidence to justify its seizure under the "plain feel" doctrine.[20] Thus, the continued sliding and squeezing of the object exceeded the scope of a legitimate *Terry* frisk.

> **"Courts carefully scrutinize the scope of a frisk to determine whether an officer's stated concern for safety was legitimate...."**

Although the officer in *Dickerson* contended that he immediately recognized the feel of crack cocaine before conducting the expanded manipulation of the object in Dickerson's pocket,[21] the Supreme Court apparently agreed with the Minnesota Supreme Court's conclusion set forth below that the officer's contention was not credible:

> "We are led to surmise that the officer's sense of touch must compare with that of the fabled princess who couldn't sleep when a pea was hidden beneath her pile of mattresses."[22]

Three important principles can be drawn from an analysis of *Dickerson*:

1. An officer may rely on the sense of touch to develop probable cause to make a "plain feel" seizure.
2. The probable cause requirement to make a "plain feel" seizure has not been diminished.
3. The "plain feel" doctrine does not enlarge the scope of a *Terry* frisk.✦

Endnotes

[1] 113 S.Ct. 2130 (1993).

[2] *Id.* at 2136.

[3] *Terry* v. *Ohio*, 392 U.S. 1 (1968) (A protective frisk may be conducted if a reasonably prudent person under the circumstances would be warranted to believe that his safety or that of others was in danger.)

[4] *United States* v. *Ross*, 827 F.Supp. 711 (1993).

[5] *Id.* In response to leading questions by prosecutor, the officer testified that the matchbox he felt during frisk might have contained a razor blade; however, the court found that the officer was not really concerned about a razor blade but that the removal of the box was part of deliberate and focused search for drugs.

[6] *State* v. *Evans*, 618 N.E.2d 162 (Ohio 1993); *Commonwealth* v. *Patterson*, 591 A.2d 1075, 1078 (Pa. Super. 1991); *Commonwealth* v. *Johnson*, 54 Cr.L. 1054 (Pa. Super. 1993).

[7] *Minnesota* v. *Dickerson*, 113 S.Ct. 2130, 2136 (1993).

[8] 826 F.Supp. 33 (D. Mass. 1993).

[9] *Id.* at 37. *See also, United States* v. *Taylor*, 997 F.2d 1551 (D.C. Cir. 1993) (A second frisk of defendant's pocket fell outside the bounds of

a lawful *Terry* search because it was not aimed at, let alone limited to, the discovery of weapons.)

[10] *State* v. *Evans*, 618 N.E.2d 162 (Ohio 1993). *See also, United States* v. *Oates*, 560 F.2d 45 (1977).

[11] 3 LaFave, *Search and Seizure* 522, Section 9.4(c) (2d Ed. 1987).

[12] 825 F.Supp. 38 (S.D.N.Y. 1993).

[13] *United States* v. *Brooks*, 2 F.3d 838 (8th Cir. 1993).

[14] Under the "Plain View" Doctrine, if officers are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant. *Horton* v. *California*, 496 U.S. 128, 136-137 (1990); *Minnesota* v. *Dickerson*, 113 S.Ct. 2130, 2136-37 (1993).

[15] *Arizona* v. *Hicks*, 480 U.S. 321, 326 (1987); *United States* v. *Naugle*, 997 F.2d 819 (10th Cir. 1993).

[16] *Commonwealth* v. *Johnson*, 54 Cr.L. 1054, 1055 (Pa. Super. 1993).

[17] *Unites States* v. *Ross*, 827 F.Supp. 711 (1993).

[18] The court in *Ross* stated that "It would strain credulity to conclude that by his sensing of the box the presence of cocaine therein was 'immediately apparent.'" *Id.* at 719 n. 16.

[19] *Arizona* v. *Hicks*, 480 U.S. 321 (1987); *Minnesota* v. *Dickerson*, 113 S.Ct. 2130, 2137 (1993).

[20] "[A]n officer who satisfies himself while conducting a *Terry* check that no weapon is present in a container is not free to continue to manipulate it in an attempt to discern the contents." *United States* v. *Williams*, 822 F.2d 1174, 1184 (D.C. Cir. 1987).

[21] In *Dickerson*, the officer never believed nor made any claim that he suspected the lump to be a weapon.

[22] *State* v. *Dickerson*, 481 N.W.2d 840, 844 (Minn. 1992).

Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.