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FACTS

Timothy Dickerson was convicted of possession of a controlled substance in the fifth degree.[1] He challenged the admission of the crack cocaine seized by the police officers on the grounds that the search violated the Fourth Amendment.

On November 9, 1989, two police officers in Minneapolis were patrolling the north side of the city in a marked squad car. During that evening, one of the officers observed Timothy Dickerson leaving a building considered to be a notorious "crack house." In fact, one of the officers, Vernon Rose, had previously responded to complaints of drug sales in the building. Rose saw Dickerson leaving the apartment building and heading in the direction of the police car. Dickerson made eye contact with Rose, and then Dickerson abruptly turned around and began walking toward a side alley on the other side of the apartment building. This action raised the officers' suspicion, and they decided to investigate further.

The officers drove their squad car into the alley, and ordered Dickerson to stop and submit to a patdown search. Dickerson did not make any evasive movements or efforts to conceal. The pat search revealed no weapons, but Officer Rose did feel a small lump in the front pocket of Dickerson's nylon jacket. Rose examined the lump with his fingers. Based upon his experience, he knew the lump was crack cocaine in cellophane wrap. The officer then reached into the pocket and pulled out a small plastic bag containing one fifth of one gram of crack cocaine. Dickerson was then arrested and charged with possession of a controlled substance.

Dickerson moved pretrial to suppress the cocaine, but the trial court held that the officers were justified in stopping Dickerson under *Terry v. Ohio* to see whether he was engaged in criminal activity and could search him to ensure that he was not carrying a weapon.[2] By analogizing the *Terry* exception to the "plain view" doctrine, the trial court found that the search did not violate the Fourth Amendment.

The trial court reasoned that since an officer is permitted to make a warrantless seizure of contraband found in plain view, the Fourth Amendment would not be violated by the seizure of contraband that the officer can easily feel when frisking a suspect. After the denial of the suppression motion, Dickerson was found guilty at trial.

On appeal, the Minnesota Court of Appeals reversed. The court agreed that the investigative stop and patdown search were lawful under *Terry* because there were specific facts that indicated that Dickerson might be engaged in criminal behavior and that he might be armed and dangerous. However, the court of appeals explicitly refused to adopt a "plain feel" exception to the requirement that, except in very limited circumstances, a police search requires that a warrant be obtained.[3]

The Minnesota Supreme Court affirmed. The court held that both the stop and the patdown were permissible without a warrant, but the seizure of the cocaine was not. The court refused to extend the "plain view" doctrine to the "plain feel" doctrine because "the sense of touch is inherently less immediate and less reliable than the sense of sight."[4] A "plain feel" doctrine would be far more intrusive into

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[1] At the time of Dickerson's arrest and conviction, Minnesota statute § 152.025 provided in part that "[a] person is guilty of controlled substance crime in the fifth degree if the person unlawfully possesses one or more mixtures containing a controlled substance . . . except a small amount of marijuana."

[2] 392 U.S. 1 (1968) (finding a valid search under the Fourth Amendment when an officer "observes unusual conduct which leads him to reasonably conclude in light of his experience that criminal activity may be afoot . . . he is entitled . . . to conduct a carefully limited search of outer clothing of such person in an attempt to discover weapons which might be used to assault him."). This search is to be limited to what is necessary for the discovery of weapons; it is to allow the officer to continue in the investigation of possible criminal activity without fear of violence. *Dickerson*, 113 S.Ct. at 2136. If the search goes beyond these bounds it is no longer valid and its fruits will be suppressed. *Id.* If a legitimate *Terry* search turns up contraband it is admissible as evidence. *Id.*

[3] *Minnesota v. Dickerson*, 469 N.W.2d 462, 466 (Minn. Ct. App. 1991).

[4] *Minnesota v. Dickerson*, 481 N.W.2d. 840, 845 (Minn. 1992).

the personal privacy that is at the core of the Fourth Amendment.[5] The Minnesota court also decided that the search went far beyond what was authorized because the officer determined that the lump in the jacket was contraband only after probing and investigating what was clearly not a weapon. His search, therefore, went beyond ascertaining whether Dickerson was armed. The state petitioned the United States Supreme Court for certiorari, which was granted.[6]

HOLDING

The Supreme Court affirmed the decision of the Minnesota Supreme Court.[7] The Court found the case similar to *Arizona v. Hicks*,[8] where seizure of stolen stereo equipment was held invalid because the officers did not know the equipment was stolen until they moved the equipment to read the serial numbers.[9] In the present case, although the officers could search Dickerson for weapons, the seizure of the crack cocaine was improper because the incriminating character of the object was not immediately apparent to the officer.[10] The officer who felt the cellophane-wrapped object could not have determined it was contraband until he conducted a further search, unauthorized under *Terry*.[11] Because further search of the jacket pocket was constitutionally impermissible, the seizure of the cocaine from that pocket was also unconstitutional.[12] Therefore, the suppression of the cocaine by the Minnesota trial court was correct.[13]

ANALYSIS/APPLICATION

Writing for the Court, Justice White reaffirmed the principle that searches and seizures conducted without prior approval of a judge or magistrate are per se unreasonable under the Fourth Amendment, "subject only to a few specific and well delineated exceptions."[14] *Terry* created one such exception.[15] The Court determined that the seizure of evidence discovered during a legitimate *Terry* search was analogous to the seizure of evidence permissible under the "plain view" doctrine.[16]

According to Justice White, the Minnesota Supreme Court's rejection of the "plain view" analogy was wrong.[17] The premise of the *Terry* decision itself was that the sense of touch may reveal the nature of an object with sufficient reliability to justify a seizure.[18] It is precisely the inference of *Terry* that the officers will be able to determine the presence of weapons by the sense of touch; the seizure of weapons thus found is clearly permitted by *Terry*.[19]

The sense of touch is less reliable than vision, but that does not mean that it is never correct. An officer making a search based on either vision or touch must have probable cause to justify the search. Probable cause may be more difficult to show in the latter case, but the Fourth Amendment imposes this requirement to ensure against grossly speculative seizures.[20]

The Court held that the second concern of the Minnesota Supreme Court, that touch is more intrusive than sight, was invalid because the search for weapons by sense of touch has been authorized by *Terry*.[21] There is no additional loss of privacy from a "plain feel" contraband seizure in the course of a *Terry* search for weapons.[22]

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[5] *Id.*
[6] *Minnesota v. Dickerson*, 113 S.Ct. 53 (1992).
[7] *Dickerson*, 113 S.Ct. at 2130.
[8] 420 U.S. 321 (1987).
[9] *Dickerson*, 113 S.Ct. at 2139.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.* at 2135 (quoting *Thompson v. Louisiana*, 469 U.S. 17 (1984) (per curiam) (holding that although the homicide investigators may have had probable cause to search the premises, for the search to be valid, it must fall within one of the narrow and specifically delineated exceptions to the warrant requirement of the Fourth Amendment)).
[15] *See supra* note 2.
[16] *Dickerson*, 113 S.Ct. at 2137. The rationale behind the "plain view" doctrine is that discovery of an object in plain view is not a search within the meaning of the Fourth Amendment. The rule is the same for tactile discoveries. If an officer pats down a suspect's clothing and feels a bulge and immediately recognizes the unlawful nature of the object, then there has been no invasion of the suspect's privacy interest beyond the legitimate *Terry* search for weapons. But if the officer lacks probable cause to believe that the object is contraband without conducting a further search, the seizure of the object is constitutionally invalid.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.* at 2138.

Applying these principles, the Supreme Court agreed that the officers were acting lawfully when they stopped and frisked Dickerson.[23] In fact, these two issues were not challenged by Dickerson.[24] The dispositive question for the Court was whether the officer was acting constitutionally in continuing the contraband search after ascertaining that Dickerson was unarmed.[25] According to his trial testimony, the officer could not immediately ascertain that the object was crack cocaine, but rather engaged in "squeezing, sliding and otherwise manipulating the contents of the defendant's pocket," after determining that the pocket did not contain a weapon.[26]

The Court held that the officer clearly overstepped the bounds of the narrow search for weapons allowed under *Terry*.[27] The sole justification for a search authorized by *Terry* is the protection of the officers and bystanders. Where an officer is conducting a valid search for one item and seizes a different item, the Court "has been sensitive to the danger . . . that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will."[28] Here, once the officer concluded that Dickerson was unarmed, his further search of the contents of Dickerson's jacket pocket was unrelated to the *Terry* exception.[29] Since the further search of Dickerson's pocket to determine that Dickerson was carrying crack cocaine was not constitutionally valid, the seizure of the crack cocaine found there was constitutionally impermissible.[30]

In a concurring opinion, Justice Scalia questioned the holding in *Terry*. According to Scalia, one can seek the meaning of Fourth Amendment guarantees in contemporaneous common law practices. Scalia conceded that common law precedent permits stops on suspicion, but pointed out that there is no "precedent on physical search of a person thus temporarily detained."[31] However, while the decision in *Terry* is not based on precedent, Scalia stated that he "cannot say that its result is wrong."[32]

Chief Justice Rehnquist, joined by Justice Blackmun and Justice Thomas, agreed with the Court in its explication of the principles of a "plain feel" exception. They did not however concur in the Court's application of those principles to the facts of *Dickerson*. The trial court's findings were not precise as to the officer's probable cause to believe that the object contained in the pocket was contraband.[33] According to the dissenters, the case should have been remanded so that the trial court could make a precise finding on this issue.[34]

After *Dickerson*, it is clear that once police officers determine that a suspect is not carrying a weapon, the police are not authorized to search any further. However, if the police, while searching for weapons, detect an object which they immediately recognize as being contraband, this object can lawfully be seized. In this regard, *Dickerson* seems to logically follow the Court's decision in *Terry* because it ensures that police searches are made for a specific purpose and are not used as a general warrant to seize any contraband that is found.

Although this case may seem to be fair and just at first reading, one must look at its ramifications to determine if the Court did in fact reach a just result. The Court's holding in *Dickerson* has been interpreted by some lower courts to mean that location plus evasion equals reasonable suspicion for a stop.[35] Courts also usually allow a frisk following a *Terry* stop when the crime involves drugs, even when there is no indication that the suspect is armed.[36]

The implications of these results have a substantial impact on minorities. Since "zones of high crime activity"— including drug activity — "are concentrated in inner city neighborhoods," a disproportionate number of blacks and Latinos are stopped. These stops frequently include those without justification, since a large proportion of the population of inner cities consists of blacks and Latinos.[37] If, as in *Dickerson*, mere presence in a crime area can help create a reasonable suspicion, then minorities will suffer because a large number of minorities work and live in inner cities, where most crime occurs.

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[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id. See also Texas v. Brown*, 460 U.S. 730, 748 (1983) (Stevens, J. concurring).
[29] *Dickerson*, 113 S.Ct. at 2139.
[30] *Id.* at 2139.
[31] *Id.* at 2140.
[32] *Id.* at 2141.
[33] *Id.*
[34] *Id.*
[35] *See* Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 Ind. L.J. 659, 674-675 (1994).
[36] *Id.* at 676.
[37] *Id.* at 677.

This does not seem to be a fair result since it is by virtue of "their relative socioeconomic status" that minorities find themselves living in crime prone neighborhoods.[38]

Another factor that some lower courts have used to justify a stop and frisk is evasion from the police. It is thought that if people run from the police then there must be something to hide; that is not always the case. Police are more likely to stop minorities than they are non-minorities,[39] and thus it appears that minorities have more reason to avoid police even if they are not engaging in any illegal behavior. Since minorities are more likely to be stopped by the police, they will comprise a disproportionate number of people subjected to searches authorized by *Dickerson*.

[38] *Id.* at 678.
[39] *Id.* at 679.
[40] *Terry*, 392 U.S. at 38.

CONCLUSION

In his dissent to the *Terry* opinion, Justice Douglas said, "to give the police greater power than a magistrate is to take a long step down the totalitarian path."[40] Justice Douglas thought that this would lead to greater infringements of the Fourth Amendment guarantees. *Dickerson*, as applied by the lower courts, appears to be yet another step down that path, and there may be others steps to come which further erode the Fourth Amendment. *Dickerson* may lead to further routine invasions of privacy, and minorities have the most to fear from this since they are the most likely to be stopped and frisked. Perhaps the Court would do well to heed the words of Benjamin Franklin who said, "those who would sacrifice liberty for a little security deserve neither liberty nor security."

Summary and Analysis Prepared by:
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