IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JAMIE LEE ANDERSON — APPELLANT

VERSUS

STATE OF MISSISSIPPI — APPELLEE

SUPREME COURT DOCKET NO. 2008-KA-00601-COA

APPEAL FROM THE

CIRCUIT COURT OF NESHOBA COUNTY

BRIEF OF APPELLANT
JAMIE LEE ANDERSON

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

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Respectfully submitted,

Christopher A. Collins

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STATEMENT OF THE ISSUE

Whether an officer may remove from an individual's person a concealed item that the officer knows is not a weapon when the officer has no probable cause to suspect the individual of any wrongdoing and the search is only a "pat down" for weapons.

STATEMENT OF THE CASE

A. Course of the Proceedings Below

The Defendant was charged with Possession of Methamphetamine, Second Drug Offense. (R.E.[1] p.6). Prior to trial, the Defendant filed a Motion to Suppress Evidence. (R.E. p. 7). At trial, the Court conducted a hearing on Defendant's Motion to Suppress. (T. pp. 22-59). The trial court overruled Defendant's Motion to Suppress. (T. p. 61). At the conclusion o the State's case, the Defendant made a Motion for Directed Verdict. (T. p. 85). This Motion was denied by the trial court. (T. p. 86.). The jury deliberated and found the Defendant guilty. (T. p. 97). The trial court entered a Judgment finding the Defendant guilty and sentencing him to twelve years imprisonment. (R.E. p. 10). Subsequent to trial, Defendant filed a timely Motion for a New Trial or Other Relief. (R.E. p. 12). The trial court overruled the Motion (R.E. p. 14). The Defendant thereafter filed timely Notice of Appeal. (R.E. p. 15).

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[1] The following abbreviations are used: R.E. for Appellant's Record Excerpts; T for Transcript.

B. Statement of Relevant Facts

In response to a phone call from a citizen of the community, officers went to the residence of Thomas Walden. (T. pp. 18-19). Through a glass door, officers observed Daniel Day asleep on the sofa and also observed a handgun on a nearby table. (T. pp. 20-21). Recognizing Day as a convicted felon, the officers entered the residence to arrest him. (T. p 21). The Defendant, who was present in the home, was required to step outside onto the porch. (T. p. 23). The officers admitted that Defendant was fully compliant with their request and that they observed no weapon or contraband on his person. (T. p. 31). Officer Truett testified that he patted down the Defendant to assure that he did not have a weapon. (T. p. 39). As Officer Truett patted down the Defendant, he felt what he recognized as a "pill bottle." (T. p. 40). He was certain that it was a pill bottle because he had "felt a gazillion pill bottles." (T. p. 40). Officer Truett testified that he removed the bottle from the Defendant's pocket, looked into it without opening it, and saw contraband.. (T. p. 40). At that time the Defendant was placed in handcuffs.

SUMMARY OF THE ARGUMENT

For sake of clarity it should be remembered that the patdown search of the Defendant was not a search incident to arrest – no cause existed for his arrest prior to the search. Neither was the search itself based on probable cause – none existed. The search was a patdown for weapons. (T. p. 44). Whether or not an officer could seize from the Defendant and examine an item that was not within plain view and clearly not a weapon, depends upon application of the "plain feel" doctrine established by *Minn. v. Dickerson*, 508 U.S. 366 (1993).

The validity of a "plain feel" search is based on a showing of three factors. One factor is that the incriminating nature of the object detected by the officer's touch must be immediately apparent to the officer so that before seizing it the officer has probable cause to believe the object is contraband. This was simply not the case. The officer testified that he knew immediately that he felt a pill bottle. He had, without further search, no way to determine the contents of the container. Further, the act of carrying a pill bottle in one's pocket was not so unusual as to raise any justified concern that the bottle probably contained contraband. Essentially, the container within the Defendant's pants pocket was immediately apparent to the officer, its contents were not.

The "plain feel" doctrine is closely analogous to the plain view doctrine. If the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object - that is, if its incriminating character is not immediately apparent - the plain-view doctrine cannot justify its seizure. It would be difficult to argue that the presence of a pill bottle beside the Defendant's bed would give rise to probable cause for a search. Neither is the carrying of a pill bottle in his pants pocket so unusual as to warrant such a conclusion. Given the utility and wide availability of ordinary pill bottles, it certainly cannot be

said that finding one on Defendant's person gave rise to any suggestion of wrongdoing. Further, the only crime that officers detected on the premises had nothing to do with illegal drugs and was totally unrelated to the Defendant, other than as to his presence at the scene. Doubtless the officer concluded that such pill bottles sometimes contain contraband. However, the officer could not simply conclude that because other individuals had sometimes used such containers for contraband, that possession by the Defendant of a simple bill bottle incriminated him.

The officer lacked any arguable reason for the search of the Defendant other than as a general sweep of the area for weapons. He was certain that he had not uncovered a weapon when he felt the pill bottle in Defendant's pants pocket. His seizure and search of the pill bottle was unreasonable under the Fourth Amendment as applied to the States through the Fourteenth Amendment. Thus, all evidence resulting from that search should be suppressed.

ARGUMENT

The Defendant was merely within a residence where Daniel Day was sleeping in close proximity to a firearm. (T. p. 39). Day, being a convicted felon, could not lawfully possess the weapon. Nothing in the record, however, indicates that the Defendant knew that Day was, in fact, a convicted felon. The mere presence of a firearm within the residence would certainly not have been sufficient probable cause to suspect a crime had the officer not recognized Day as a convicted felon. Thus, otherwise lawful conduct became unlawful simply because the conduct was by Day, a convicted felon. In short, the officers observed nothing to suggest illegal activity as to anyone other than Daniel Day.

The officers escorted the Defendant out of the residence and onto its porch. (T. p. 39). The Defendant was then "patted down" to assure that he did not have a weapon. (T. p. 39). During the "pat down" for weapons, the officer felt what he recognized to be a pill bottle in the pants pocket of the Defendant. (T. pp. 40, 68). The officer then pulled out the pill bottle and examined it. (T. p. 40). Looking through the bottle, he saw what he believed to be contraband. (T. p. 40).

Defendant does not argue that a police officer may not make a "pat down" search for weapons when circumstances warrant. However, Defendant does maintain that such a "pat down" is limited to a search for weapons. Should the officer discover an object that he knows not to be a weapon, and which is not contraband of itself, the officer may not simply remove the object to "check it out."

The United States Supreme Court considered this precise question in *Minn. v. Dickerson*, 508 U.S. 366 (1993). In *Dickerson*, police officers observed an individual leaving what they believed to be a "crack house." *Id.* at 368. Upon seeing the officers, the individual began what the officers deemed evasive actions. *Id.* at 369. The officers decided to stop the individual for

further investigation. *Id.* During a patdown search, the officer felt a lump. *Id.* The officer manipulated the lump and determined that it felt like a lump of crack cocaine wrapped in cellophane. *Id.* The officer then reached inside the individual's pocket and removed the substance, which turned out to be cocaine. *Id.*

Both the Minnesota Court of Appeals and the Minnesota Supreme Court reversed the resulting conviction. The United States Supreme Court granted certiorari, to resolve a conflict among the state and federal courts over whether contraband detected through the sense of touch during a patdown search may be admitted into evidence. *Id.* at 371. The Court noted that time and again, the Court had observed that searches and seizures "'conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions. *Id.* at 372. The *Dickerson* court explained that under *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968), the police may, under proper circumstances, conduct a patdown search to determine whether or not the individual is carrying a weapon. *Minn. v. Dickerson*, 508 U.S. at 373. The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence. *Id.* If the 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.*

The Court discussed the contours of the "plain view" doctrine. *Id.* at 375. Under that doctrine, if the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object , that is, if "its incriminating character [is not] immediately apparent," the plain-view doctrine cannot justify its seizure. *Id.* (citing *Arizona* v. *Hicks*, 480 U.S. 321, 94 L. Ed. 2d 347, 107 S. Ct. 1149 (1987)).

According to the Court, the plain-view doctrine was clearly applicable by analogy to cases in which the officer finds contraband by sense of touch. *Minn. v. Dickerson*, 508 U.S. at 375. Thus, if a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context. *Id.*

Ultimately the Supreme Court affirmed dismissal of the action. *Id.* at 379. The Court reasoned that the incriminating nature of the lump felt by the officer was not immediately apparent to him. *Id.* Rather, the officer determined that the item was contraband only after conducting a further search - one not authorized by *Terry* or by any other exception to the warrant requirement. *Id.* Because this further search of respondent's pocket was constitutionally invalid, the seizure of the cocaine that followed was likewise unconstitutional. *Id.*

As applied to the case *sub judice*, the officer was conducting a patdown search for weapons. (T. p. 39). When he felt the object in Defendant's pants pocket, the officer immediately knew that it was not a weapon. He immediately recognized it as a pill bottle because he had "felt a gazillion pill bottles." (T. p. 40). Under the rule established in *Dickerson*, the officer had no right to investigate the contents of the pill bottle further.

It is important to remember that the officer simply felt a pill bottle, which is not contraband of any kind. Hundreds of thousands, perhaps millions, of people lawfully carry personal medication, both prescription and non-prescription, on their persons each day. This is not a "plain touch" case in which the officer would immediately determine that the item felt was contraband.

The analogy to the plain view doctrine applied by the *Dickerson* court is apt. Simply put, would the officers have been justified in entering a home simply because they observed a pill bottle in plain view on the table? It must be remembered that the only crime the officers had any basis to believe had occurred was possession of a firearm by a felon. Had the officers felt probable cause existed to search the home for drugs, they could have easily presented the basis of such to a magistrate. Similarly, had the officer felt that the mere possession of a pill bottle in the pocket of the Defendant created probable cause for his arrest, the officer could have done so.

Instead, the officers sought to use the results of the search as the basis for Defendant's arrest. Had the Defendant been lawfully arrested based on probable cause and then searched, the officers might have acted lawfully. They may not, however, use the results of a search to justify the search itself.

Mississippi courts have similarly refused to permit a patdown search for weapons to extend beyond its limited purpose. In *Carr v. State*, 770 So. 2d 1025 (Miss. App. 2000), police were investigating an automobile burglary during the early morning hours. *Id* at (¶2). The officers saw an individual on bicycle nearby with a flashlight and a cordless phone. *Id.* When the officers sought to speak with the individual, he fled. *Id.* at (¶3). The officers caught and searched him, finding gold jewelry and a checkbook bearing someone's name other than the suspect. *Id.*

The *Carr* court determined that the police lacked probable cause to arrest the suspect at the time they observed him riding a bicycle. *Id.* at (¶8). Officers did, however, have justification for a brief investigatory stop. *Id.* According to the court, although officers were justified in conducting a patdown search for weapons if they had a reasonable concern that the individual might be armed; the search conducted was far more intrusive. *Id.* at (¶9). The Court noted that nothing supported a legitimate conclusion that the weapons patdown produced evidence of a

possible weapon concealed on Carr's person so as to then support the more intrusive requirement that Carr disclose all items then held by him on his person. *Id.* The court concluded that, absent a lawful arrest, there could have been no search incident to arrest and ruled that the evidence obtained should have been suppressed. *Id.* at (¶¶10-11).

Carr demonstrates that a patdown search is for weapons. Further, there must be sufficient grounds for an arrest before a search may me made incident to such arrest. The police may not simply use a patdown for weapons as a pretext for conducting a search for contraband. If the scope of the weapons search exceeds that necessary to discover a weapon, any evidence secured thereby must be suppressed unless officers had sufficient cause to justify arrest before the results were discovered.

Since the United States Supreme Court in *Dickerson* found a patdown search for weapons with a subsequent discovery of contraband akin to the "plain view" doctrine, an examination of what "plain view" means is appropriate. The Mississippi Supreme Court discussed some of the contours of the doctrine in *White v. State*, 735 So. 2d 221 (Miss. 1999). In *White* an individual was arrested for violation of the open container law. *Id.* at (¶3). A patdown search revealed bullets in the suspects pocket, so the officer conducted a weapons search of the vehicle. *Id.* at (¶4). Upon finding a handgun, the officer handcuffed the suspect and conducted a more through search in which he found a medicine bottle under a jacket. *Id.* The officer opened the bottle and found what he believed to be cocaine. *Id.*

The *White* court rejected any contention that the bill bottle was within the plain view exception. *Id.* at (¶8). The *White* court, quoting at length from *Ferrell v. State,* 649 So. 2d 831 (Miss. 1995), further noted that the Fifth Circuit has held that "a container cannot be opened unless its ***contents*** are in plain view or they can be inferred from the container's outward appearance." *Id.* (emphasis in the original).

There is no question that contents of the pill bottle were concealed within Defendant's pants pocket at the time of the patdown. (T. p. 68). Thus, the remaining question is whether the contents of the pill bottle could be inferred from the container's outward appearance.

Pill bottles are fairly ubiquitous. Citizens often carry pill containers upon their persons. These may contain prescription medications, patent drugs, small items that the individual does not wish to have loose in his pocket, or in rare instances the bottle may contain contraband. Police officers could never reasonably infer from the mere presence of a bill bottle in an individual's pocket that the bottle contained contraband.

The pill bottle discovered on the person of the Defendant is much like the match box that was improperly searched in *Ferrell v. State,* 649 So. 2d 831 (Miss. 1995). In *Ferrell* a driver was arrested for traffic offenses. *Id.* at 832. After the suspect had been placed in the squad car, the officer returned to the car to retrieve the keys. *Id.* The officer noticed a matchbox, he lifted the matchbox and found a yellow pill. *Id.* He then opened the matchbox and found matches. *Id.* However, he then continued his search and found another matchbox which he opened to find cocaine. *Id.*

The *Ferrell* considered whether the plain view doctrine was applicable to the contents of the matchbox. *Id.* at 834. The Mississippi Court rejected the contention that the contraband was in plain view. The Court stated,

> "Given their utility and wide availability, matches are common objects in the every day world. The mere presence of a matchbox on the front seat of a car ordinarily cannot be termed an incriminating object in plain view."

Id.

Defendant would urge that pill bottles, just as matchboxes, have great utility and wide availability, such that the mere presence of one in an individual's pocket would not be termed an

incriminating object in plain view – or as might be better phrased in connection with a patdown search, "in plain touch."

Other jurisdictions have rejected the argument that the discovery of common objects that are also occasionally used by drug users to conceal contraband during a patdown search meets the requirement of the "plain feel" doctrine. In *Ex parte Warren*, 783 So. 2d 86 (Ala. 2000), the Alabama Supreme Court articulated the three requirements of the plain feel doctrine of *Dickerson* as:

> "1. The officer must have a valid reason for the search, i.e., the patdown search must be permissible under Terry.
>
> 2. The officer must detect the contraband while the Terry search for weapons legitimately and reasonably is in progress.
>
> 3. The incriminating nature of the object detected by the officer's touch must be immediately apparent to the officer so that before seizing it the officer has probable cause to believe the object is contraband."

Ex parte Warren, 783 So. 2d at 90.

In *Ex parte Warren,* officers conducted a *Terry* patdown search of the accused. The found a plastic breath mint box in his front pants pocket. *Id.* at 89. The Alabama Court found that the first two *Dickerson* elements had been met. *Id.* at 90. The court noted that sister states have also wrestled with the problem we address here: "Can an officer's tactile perception of an object such as a Tic Tac box, a matchbox, a pill bottle, or a film canister give the officer probable cause to believe, before seizing it, that the object is contraband?" *Id.* at 91. The *Ex parte Warren* court quoted the Pennsylvania Supreme Court, "the mere fact that an officer has seen others use an object to package drugs ... does not mean that once the officer feels that object during a patdown search of a different individual, he automatically acquires probable cause to seize the object under the plain-feel doctrine as something that is 'immediately apparent' as contraband." *Id.* The Alabama Court found that the better-reasoned view was that if the object detected by the

officer's touch during a *Terry* search is a hard-shell, closed container, then the incriminating nature of any contents of that container cannot be immediately apparent to the officer until he seizes it and opens it. *Id.* at 94. (emphasis in original).

The Tennessee Supreme Court reached a similar decision in *State v. Bridges*, 963 S.W.2d 487 (Tenn. 1997) where an officer conducted a patdown search of an individual he knew to have a felony record. The officer felt a small object in the shape of a pill bottle in the defendant's right jacket pocket and recognized it as a container that drug dealers used. *Id.* at 491. The officer testified that he immediately recognized it as a pill bottle. *Id.* at 495. The Tennessee Court concluded that under the proof offered, it was evident that it was not immediately apparent to the officer that the bottle contained contraband until it was removed from the defendant's pocket. *Id.*

Cases uniformly show that a major distinction exists between an officer detecting actual contraband during a patdown search and an officer simply discovering a container that may or may not contain contraband. When only a container is discovered, no further search of the container is permitted unless probable cause exists.

Police did not suggest that they had probable cause to remove the pill bottle from the Defendant's pocket. The officer simply found the container and retrieved it. In fact, no probable cause existed. Such pill bottles are common and widely used. Virtually every household has several. They are often carried on an individual's person and the Defendant's pants pocket was not an unusual location in which to find such an item. The officers had seen no drugs or drug activity at the location where the search was made. They had made an arrest totally unrelated to the Defendant or to drug related activity.

For purposes of argument, it may be assumed that the officers were justified in conducting a patdown search for weapons. Such a warrantless search must be carefully circumscribed and does not permit a general "fishing expedition" to determine the contents of an

individual's pockets. The search of the pill bottle exceeded the limited exception for warrantless searches upon which the item was discovered. The seizure of the bottle and its contents were thus a violation of the Defendant's rights under the Fourth Amendment.

CONCLUSION

Based on the authorities and argument stated herein, the order of the trial court denying suppression of the evidence should be reversed. Further, the Order Overruling Motion for New Trial should be reversed.

CERTIFICATE OF SERVICE

I, Christopher A. Collins, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to the following:

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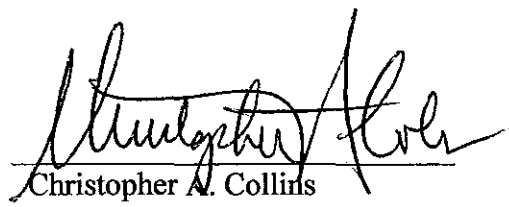
SO CERTIFIED, this the 2ND day of October, 2008.

Christopher A. Collins

CERTIFICATE OF FILING

I, Christopher A. Collins, attorney for the Appellant, Jamie Lee Anderson, do hereby certify that I have this date filed Brief of Appellant by depositing an original and three copies of Brief of Appellant with the United States Postal Service, first class postage prepaid, addressed to Betty W. Sephton, Clerk, Supreme Court and Court of Appeals, Post Office 249, Jackson, Mississippi 39205-0249.

This, the 2ND day of October, 2008.



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