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Terry Frisks and the "Plain Feel" Doctrine

QUESTION: **Does the "plain feel" doctrine allow police officers conducting *Terry* frisks/pat-downs for weapons to seize evidence when it is immediately apparent to them that the item touched is contraband or evidence of a crime?**

ANSWER: **Yes. As long as the frisk itself is lawful, an officer can seize any item he/she immediately recognizes as contraband or evidence of a crime. Probable cause however, and not reasonable suspicion, is the standard for the "plain feel" doctrine.**

CASE: ***Reginald McCracken v. State of Maryland,* Court of Appeals of Maryland Decided November 28, 2012**

The subject of a *Terry* "frisk" for weapons was again before our Court of Appeals in this recent case. The facts of the case showed that Baltimore City Police Officer Adrian McGinnis responded to a report of an armed individual in the early morning hours of September 18, 2010. Officer McGinnis arrived on the scene just minutes later and saw a man and woman arguing on the front porch of a residence. Other officers already on the scene separated the man and woman and several of them then stood around the man at the bottom of the front steps. Officer McGinnis approached the woman and spoke to her. The woman appeared afraid and refused to give her name. She said that the man had just "hacked" her to the residence from East Baltimore. She said she had argued with the man during the ride and that he threatened to shoot her. Officer McGinnis knew that "hacking" was a term describing the illegal transport of a person in exchange for money without a taxi license.

Officer McGinnis approached the man, later identified as Reginald McCracken, because he suspected the man might be carrying a handgun. He briefly spoke with McCracken who told him that he and the woman had been arguing over a cell phone. He denied, however, that he had been hacking. McCracken also said that he didn't live in the neighborhood but had arrived there on foot after his wife had dropped him off. Believing that McCracken might be armed, Officer McGinnis frisked McCracken's outer clothing. While patting down McCracken's left pants pocket, Officer McGinnis felt a set of keys and a small box attached to the keys, which he believed to be a car remote. Believing that the remote belonged to McCracken's car, Officer McGinnis removed the keys and remote them from McCracken's pants pocket and pressed the alarm button on the remote. Although he didn't know it, the officer suspected McCracken's car was parked nearby. An alarm sounded on a car parked just a few car-lengths away. Officer McGinnis shone his flashlight through the open window on the passenger side. He immediately

saw a black handgun in the open glove compartment. He reached into the car and grabbed the gun.

McCracken was charged with transporting a handgun in a motor vehicle. He moved to suppress the evidence prior to trial. McCracken did not challenge the officer's authority to conduct the frisk; instead he challenged the *scope* of the frisk by arguing that an item touched during a lawful frisk cannot be seized under the "plain feel" doctrine unless the item, once felt, is immediately recognized by the officer to be contraband or evidence of a crime. In other words, it must be "immediately apparent" to the officer that the object possessed by the suspect is possessed unlawfully. McCracken urged that merely touching a set of keys and a car remote did not give Officer McGinnis probable cause to believe those items were related to criminal activity. The trial court denied McCracken's motion and he was convicted of the crime. He appealed.

On appeal, the Court of Special Appeals, and then the Court of Appeals upheld the conviction. In doing so, the Court of Appeals observed that the "plain feel" doctrine has developed in the wake of the "plain view" doctrine. The "plain view" doctrine is based on sight; the "plain feel" doctrine is based on touch. One element of the "plain view" doctrine is that the "incriminating character" of the item must be "immediately apparent" to the seizing officer. All elements of the plain view doctrine, including this one, apply to the "plain feel" doctrine. "Immediately apparent" means that, upon seeing or touching the object, the officer has probable cause to believe it is contraband or evidence of a crime.

Here, before conducting the frisk, Officer McGinnis knew the following from the woman on the scene and from McCracken: (1) that McCracken allegedly had engaged in the crime of hacking; (2) that McCracken had threatened to shoot the woman; (3) that McCracken did not live nearby; and (4) that McCracken said that he didn't drive to the residence and gave inconsistent explanations as to how he got there. Consequently, by the time Officer McGinnis conducted the frisk and felt the keys and remote, he knew that those items were potentially evidence of the crime of hacking. His probable cause was based on the totality of the circumstances that established more than a fair probability that the keys and remote were evidence of the crime of hacking. Since it was immediately apparent to Officer McGinnis that he had discovered evidence of a crime, his seizure of the objects was allowed under the Fourth Amendment.

NOTE: Apart from the crime of "hacking," this case is of limited value or effect. The case does, however, remind us that every case turns on its own unique set of facts and circumstances. Further, the officer did not have to "manipulate" the keys or remote to determine what they were. The "plain feel" doctrine comes into play only when there is no doubt in the officer's mind as to the criminal nature of what has been discovered. If, on the other hand, the officer has to squeeze, slide or otherwise manipulate the object to determine what it is, a reviewing court will likely rule that the scope of the frisk violated the Fourth Amendment.

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