COURT OF APPEALS
DECISION
DATED AND RELEASED

November 21, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2252-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

IN THE INTEREST OF CARLTON S. C.-B.,
A CHILD UNDER THE AGE OF 18:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

CARLTON S. C.-B.,

Respondent-Appellant.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed*.

SULLIVAN, J. Carlton S. C.-B. appeals from a dispositional order adjudicating him delinquent for possession of a controlled substance—cocaine base, as a party to a crime. He presents this court with one issue for review—whether the trial court erred in denying his motion to suppress physical evidence. This court concludes that the police's search and eventual seizure of cocaine was proper under the "plain touch" exception to the warrant

requirement of the Fourth Amendment, and, therefore, the trial court properly denied Carlton's suppression motion. The dispositional order is affirmed.[1]

On March 8, 1995, City of Milwaukee police responded to a call of a family disturbance on the near north side of the City of Milwaukee. The call was placed by Carlton's mother. She complained to the police that her son was defiant and hard to control. Further, she informed the police that she believed her son was selling drugs. The officers conducted a pat-down search of Carlton for weapons, but no weapons were found. Officer Byron Andrews did uncover a package in Carlton's jacket that contained a substance that later tested positive for cocaine base. Carlton was taken into protective custody, and the State filed a delinquency petition against him.

Carlton later filed a suppression motion, arguing that the search violated his rights as guaranteed by the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution. Officer Andrews gave the following testimony during the suppression hearing on Carlton's motion. He stated that because Carlton was "so agitated," he conducted a pat-down search for the officers' safety. He stated that Carlton was wearing a Starter name-brand athletic jacket, with the inside out, thereby placing the normally inside pockets on the outside. He patted down the outside and felt a substance he believed to be contraband in the right pocket; he opened the jacket and pressed his open hand on it again; and then had Carlton remove the jacket. Officer Andrews further testified that through the jacket pocket's lining he "felt something sliding in the jacket which [he] believed to be plastic containing several hard objects moving around inside of the plastic." Through his training he believed these objects to be contraband. When the objects were eventually removed they were confirmed to be crack cocaine "rocks," each roughly one-quarter of an inch around.

The trial court concluded that the pat-down was valid under ***Terry v. Ohio,*** 392 U.S. 1 (1968), and that pursuant to ***Minnesota v. Dickerson,*** 508 U.S. ___, 124 L.Ed.2d 334 (1993), the officer's search and recovery of the cocaine was valid under the "plain touch" exception to the warrant requirement of the Fourth Amendment. The trial court specifically found that Officer Andrews's

[1] This appeal is decided by one judge, pursuant to § 752.31(2), STATS.

testimony that the nature of the contraband "was immediately apparent to him" was credible. Accordingly, the trial court denied the suppression motion, and Carlton pleaded guilty to the delinquency petition. He now appeals from the dispositional order.

Both the Fourth Amendment to the United States Constitution and Article I, Section 11, of the Wisconsin Constitution, guarantee citizens the right to be free from unreasonable governmental searches and seizures. We consistently apply the law of search and seizure as developed by the United States Supreme Court under the Fourth Amendment to questions raised under the state constitution in order to "prevent the confusion caused by differing standards." ***State v. Fry,*** 131 Wis.2d 153, 172-73, 388 N.W.2d 565, 573-74 (1986). 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.'" ***Dickerson,*** 508 U.S. at ___, 124 L.Ed.2d at 343-44 (citation omitted). Further, the "burden is on the state to show that the search and seizure in question fall[s] within one of the recognized exceptions to the warrant requirement." ***State v. Johnston,*** 184 Wis.2d 794, 806, 518 N.W.2d 759, 762 (1994).

The "plain touch" or "plain feel" doctrine—an extension of the "plain view" doctrine—is a recognized exception to the warrant requirement. ***State v. Buchanan,*** 178 Wis.2d 441, 449, 504 N.W.2d 400, 404 (Ct. App. 1993). For the doctrine to properly apply, the State must show the following elements:

> "(1) the evidence must be in plain view;[2] (2) the officer must have a prior justification for being in the position from which [he or] she discovers the evidence in `plain view'; and (3) the evidence seized `in itself or in itself with facts known to the officer at the time of the seizure, [must provide] probable cause to believe there is a connection between the evidence and criminal activity.'"

[2] "Evidence in plain view includes evidence an officer recognizes through any of her senses." ***State v. Guy,*** 172 Wis.2d 86, 101, 492 N.W.2d 311, 317 (1992).

Id. (citation omitted; brackets in original; footnote added).

On appeal, Carlton rightly concedes that the second element is met. The officers were informed by Carlton's mother that he was hard to control and defiant, and that she thought he was selling drugs. The allegations gave the officers reasonable suspicion to conduct a ***Terry*** stop, which in turn allowed them to conduct a pat-down of Carlton's clothing in order to locate a potential weapon. It was this lawful pat-down that provided Officer Andrews with the prior justification for being in the position from which the contraband was discovered. *See* ***id***.

Carlton argues that the remaining two elements are not met. We disagree. Because Officer Andrews felt the objects in Carlton's jacket pocket, the evidence was in "plain view." *See* ***id***. at 450, 504 N.W.2d at 404; *see also* ***supra*** note 2.

Thus, the only issue is whether the third element of the doctrine is met. The third element has also been phrased as whether the officer "immediately recognized the incriminating nature" of the contraband. *See* ***id***.; *see also* ***Dickerson,*** 508 U.S. at ___, 124 L.Ed.2d at 345. The trial court made a factual finding that Officer Andrews could and did immediately recognize the incriminating nature of the objects in Carlton's jacket. The trial court based this factual finding on its determination that Officer Andrews's testimony was credible due to his training and the information provided to Officer Andrews by Carlton's mother. While the question of whether a defendant's Fourth Amendment rights were violated presents a question of "constitutional fact" reviewed *de novo*, *see* ***State v. Heft,*** 185 Wis.2d 288, 296, 517 N.W.2d 494, 498 (1994), witness credibility determinations are left to the trial court. Accordingly, we cannot conclude that this historical factual finding, i.e., that Officer Andrews immediately recognized the object as crack cocaine, is clearly erroneous. Section 805.17(2), STATS. As such, we conclude that the state properly met all three elements of the "plain touch" doctrine and that the trial court properly denied Carlton's suppression motion.

By the Court.—Order affirmed

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.