Filed 2/22/13 In re Daniel A. CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re DANIEL A., a Person Coming Under the Juvenile Court Law.	B242027
THE PEOPLE, Plaintiff and Respondent, v. DANIEL A., Defendant and Appellant.	(Los Angeles County Super. Ct. No. MJ20939)

APPEAL from a judgment of the Superior Court of Los Angeles County. Benny C. Osorio, Judge. Reversed and remanded.

Lisa Holder, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Victoria B. Wilson and Paul M. Roadarmel, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

The juvenile court denied Daniel A.'s motion to suppress three pills removed from his pants pocket during a bicycle traffic stop, and found he had committed the offense of possession of vicodin in violation of Health and Safety Code section 11550, subdivision (a). Daniel appeals, challenging the ruling on his motion to suppress. We hold the search of Daniel's pants pocket exceeded the bounds of *Terry v. Ohio* (1968) 392 U.S. 1 (*Terry*). Accordingly, we reverse the judgment and remand the cause to the juvenile court with directions to enter a new and different order granting Daniel's motion to suppress.

FACTS

Viewed in accordance with the usual rules on appeal (*In re Dennis B.* (1976) 18 Cal.3d 687, 697), the evidence in the record establishes the following facts. On February 23, 2012, at about 7:00 p.m., Los Angeles Sheriff's Department Deputy Frank Huelga and his partner were on patrol in the vicinity of 38564 5th Street in Palmdale, an area with a high level of gang activity, violence, and narcotics use. It was dark and the street was poorly lit. Deputy Huelga saw Daniel riding a bicycle without a headlamp. Daniel was "sagging" — wearing loose fitting, baggy clothing that Deputy Huelga had seen on gang members in that neighborhood. Deputy Huelga and his partner detained Daniel. Deputy Huelga asked Daniel to put his hands on the patrol car. Daniel followed Deputy Huelga's instructions initially, but then removed his hands "multiple times" while looking around "side-to-side." Deputy Huelga decided to conduct a patdown search of Daniel "for safety purposes," based on "the totality of the circumstances."

When patting down the left side of Daniel's pants, Deputy Huelga felt items that he "believed to be numerous pills" in Daniel's pocket. During his direct examination at the hearing on Daniel's motion to suppress, Deputy Huelga testified that he recognized the items as pills "right away." On cross-examination, when asked if he believed he felt a weapon, Deputy Huelga testified he thought what he felt in Daniel's pocket "could be" a weapon,"[1] and, "just to make sure," he applied pressure and "squeezed" the items, at

[1] According to Deputy Huelga, he had previously conducted patdown searches in which he "felt something small and didn't think anything of it," only later to realize that he had missed "credit card knives, . . . little razors, . . . [and] pocket knives." According

which point he immediately concluded that he was feeling loose pills. Deputy Huelga then reached into Daniel's pants pocket and removed three pills that were later determined to be vicodin.

DISCUSSION

In *Terry*, the United States Supreme Court approved the police practice of detaining a person on reasonable suspicion of criminal activity and allowing a limited search for officer safety. Such a "*Terry* search" is limited to "an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." (*Terry, supra*, 392 U.S. at p. 29.) As a general rule, a police officer may not search further than a patdown of the outside of a person's clothing in a *Terry* situation unless the officer encounters an object that feels like a weapon or something that could be used as a weapon. (*People v. Mosher* (1969) 1 Cal.3d 379, 394; *People v. Dickey* (1994) 21 Cal.App.4th 952, 957.)

In the years following *Terry*, courts sanctioned what has become to be known as a "plain-touch" extension of the limits on a *Terry* search noted above, allowing a more intrusive search than a patdown. Under the plain-touch exception, a police officer may, in the course of a patdown search, seize an object that does not feel like a weapon when its incriminating character is immediately apparent from the patdown. As the Supreme Court has explained: "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." (See *Minnesota v. Dickerson* (1993) 508 U.S. 366, 375-376, fn. omitted (*Dickerson*).)

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to Deputy Huelga: "That's why the second I feel something I always believe that it's a weapon and I always crush the pocket just to make sure." Deputy Huelga did not explain why the object he felt *in Daniel's pocket* (which turned out to be three pills) felt as if it might be a weapon.

The parties here accept that Deputy Huelga was justified in conducting a *Terry* patdown search of the outside of Daniel's clothing. Daniel's argument is that Deputy Huelga crossed the line into an unconstitutional search when he "manipulated" the object he felt in Daniel's pocket, without having any "specific, articulable belief" that the object was a weapon. As Daniel reads the record, if Deputy Huelga had not manipulated the object, then he would not have determined it was pills. Daniel further argues that the deputy's search cannot be salvaged in any event by plain-touch principles because pills, by feel in a pocket, are not immediately recognizable as unlawful contraband.

We agree with Daniel's first argument, and resolve the case on that basis. *Dickerson, supra*, 508 U.S. 366 guides our decision. In *Dickerson*, police officers stopped the defendant as he left a building known for cocaine traffic. An officer conducted a patdown search that revealed no weapon, but the officer felt a "small lump" in the defendant's pocket. The officer "determined that the lump was contraband only after 'squeezing, sliding and otherwise manipulating the contents of the defendant's pocket' . . . ." (*Dickerson, supra*, 508 U.S. at pp. 368-369, 378.) A state trial court denied the defendant's motion to suppress, and he was convicted at trial. A state appellate court and the Minnesota Supreme Court ruled that the search had exceeded the permissible limits of *Terry*. (*Id*. at pp. 369-370.)

The United States Supreme Court affirmed the ruling to suppress the contraband. In reaching its decision, the Court analogized the constitutional issue to the situation that is presented in "plain-view" cases. Under the plain view doctrine, when contraband is left in open view and is observed by a police officer from a lawful vantage point, "there has been no invasion of a legitimate expectation of privacy and thus no 'search' within the meaning of the Fourth Amendment — or at least no search independent of the initial intrusion that gave the officers their vantage point." (*Dickerson, supra*, 508 U.S. at p. 375.) Without expressly approving the concept of plain-touch in the context of a *Terry* patdown search, the Supreme Court in *Dickerson* ruled that plain-touch could not be applied in any event because the police officer needed to manipulate the lump before determining it was contraband.

In coming to the conclusion that plain-touch did not apply, the court discussed its decision in *Arizona v. Hicks* (1987) 480 U.S. 321. There, the Supreme Court held invalid the seizure of stolen stereo equipment found by police while executing a valid search for other evidence. Although the police were lawfully on the premises, probable cause to believe that the stereo equipment was contraband did not arise until after the officers had moved the stereo equipment so they could read its serial numbers. In short, plain-view did not fit in *Hicks* because the nature of the stereo equipment as being stolen goods was not actually in the officers' plain view. (*Dickerson, supra*, 508 U.S. at pp. 378-379.) By analogy, the court in *Dickerson* determined that the officer did not know the small lump in the defendant's pocket was contraband until after the officer further manipulated the object. The court ruled the act of manipulation constituted an illegal search, beyond that which could be justified by *Terry* or by any other exception to the warrant requirement. (*Dickerson*, *supra*, 508 U.S. at p. 379.)

We come to the same conclusion in Daniel's current case. The evidence in the record shows — without any meaningful dispute — that Deputy Huelga did not "plainly feel" a weapon or recognizable contraband when he initially patted down Daniel. On the contrary, he "just felt something" in Daniel's pocket. He then "squeezed" the something to determine what it was. Absent evidence that Deputy Huelga truly believed the object he initially felt may have created a safety concern, he could not employ further searching activity beyond his initial patdown. We see no support in the evidence to show that Deputy Huelga, when he conducted the patdown, believed the object he initially felt in Daniel's pocket – which turned out to be three pills – possibly might have been used as a weapon. *Terry*'s concern, first and foremost, is with the safety of police officers. *Terry* did not issue a free-rein pass to police officers authorizing them to search the clothes of detained persons for contraband.

Because we find that Deputy Huelga's manipulation or squeezing of Daniel's pants pocket went too far under *Terry*, we do not address Daniel's argument that pills, by feel in a pocket, are not immediately recognizable as unlawful contraband.

DISPOSITION

The judgment is reversed. The cause is remanded to the juvenile court with directions to grant Daniel's motion to suppress.

BIGELOW, P. J.

We concur:

RUBIN, J.

GRIMES, J.