

[Cite as *State v. Bey*, 2005-Ohio-5842.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86234

STATE OF OHIO, : ACCELERATED  
 :  
 Plaintiff-Appellee :  
 : JOURNAL ENTRY  
 vs. : and  
 : OPINION  
 DANYELLE BEY, :  
 :  
 Defendant-Appellant :

DATE OF ANNOUNCEMENT :  
 OF DECISION : NOVEMBER 3, 2005

CHARACTER OF PROCEEDING: : Criminal appeal from  
 : Common Pleas Court  
 : Case No. CR-454983

JUDGMENT : REVERSED.

DATE OF JOURNALIZATION :

APPEARANCES:

For plaintiff-appellee: William D. Mason, Esq.  
 Cuyahoga County Prosecutor  
 BY: T. Allan Regas, Esq.  
 George A. Jenkins, Jr., Esq.  
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For defendant-appellant: Robert L. Tobik, Esq.  
 Cuyahoga County Public Defender  
 BY: Robert M. Ingersoll, Esq.  
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JAMES D. SWEENEY, J.\*:

{¶ 1} This appeal is before the court on the accelerated docket pursuant to App.R. 11.1 and Loc.App.R. 11.1. Appellant, Danyelle<sup>1</sup> Bey (“Bey”), appeals the trial court’s denial of her motion to suppress evidence and argues, as her sole assignment of error, that the trial court denied her Fourth Amendment right to be free from unreasonable searches and seizures when it denied her motion to suppress.

{¶ 2} At the suppression hearing, the state introduced Officer Saco (“Saco”) of the Cleveland police department. Saco testified that while on patrol in a high crime area, he observed a car with fake license plates and its high beams on (in violation of the city’s ordinance.) Saco stopped the vehicle, observed three people in the car, and ordered all people to place their hands where he could see them. When Saco approached the vehicle, he recognized the rear seat passenger as a known drug dealer whom he had arrested on at least two previous occasions. Saco also observed the front seat passenger, Bey, keeping one hand by her pants pocket and place something in the pocket. Bey did not comply with Saco’s order of placing both hands in plain sight.

{¶ 3} Saco testified that, for police safety, he ordered the people out of the car. Bey positioned her right hip and leg

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<sup>1</sup> Despite the fact that there are filings in the record with Bey’s first name as both “Dannyyelle” and “Danyelle,” this court will follow the spelling of Bey’s first name as it appears on the notice of appeal, as well as the lower court docket, which is “Danyelle.”

against the car, refusing to stand straight despite Saco's requests. Saco testified that Bey was wearing bulky cargo pants that had multiple pockets. Because Bey had been observed placing something in her pocket, Saco conducted a pat-down for his safety.

Saco testified that he was "unable to get a good feel what was in her pocket or on that pocket from the outside of her pants due to the fact she kept moving and going to the car." In order to get a good feel, Saco further testified that he "reached into her pocket to see what she was concealing." He felt a piece of paper wrapped around two small, hard pea-sized objects, which Saco, based on his experience, suspected was rock cocaine. Saco pulled out the item and observed the rock cocaine wrapped in a Now & Later candy wrapper. Bey was later arrested for and charged with drug possession.

{¶ 4} Bey argues that Saco's pat-down was an unreasonable search because he did not have a reasonable suspicion, based on articulable facts, that Bey was armed and dangerous. Bey further argues that her "furtive movements" were insufficient for Saco to conduct a pat-down. Here, however, based on the totality of the circumstances, there was much more than simply Bey's "furtive movements" that warranted Saco's pat-down. For instance, Bey refused to place her hands in plain sight when ordered to do so, put something in her pocket, refused to position part of her body away from the police car, and was accompanied by a known drug dealer. As testified by Saco, he ordered the people out of the car

for his safety, and conducted a pat-down of the pocket Bey was observed placing something into.

{¶ 5} Although it is well-settled that an officer need not ignore contraband should he discover it while conducting a legitimate *Terry* search, if the incriminating character of the object is not "immediately apparent" to the officer, any further, warrantless search violates the Fourth Amendment. *Minnesota v. Dickerson* (1993), 508 U.S. 366, 379, 113 S.Ct. 2130, 124 L.Ed.2d 334 (holding that the officer conducted an unreasonable search and seizure when he manipulated the "lump" he felt in the accused's pocket to determine it was contraband.) Here, it is patently clear from Saco's testimony that he could not determine the incriminating character of the object until he reached into Bey's pocket and conducted a further, non-*Terry* search, by opening the Now & Later candy wrapper to find suspected rocks of crack cocaine. Without Saco manipulating the candy wrapper, there would have been no contraband. Although Saco was lawfully in position to feel the object in Bey's pocket (because *Terry* entitled him to place his hands upon Bey's pants), the incriminating character of the object was not immediately apparent to him. Thus, the trial court erred in denying Bey's motion to suppress evidence. Bey's sole assignment of error is sustained and the trial court's denial is reversed.

Judgment reversed.

This cause is reversed for proceedings consistent with this opinion.

It is, therefore, ordered that said appellant recover of said appellee her costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES D. SWEENEY\*  
JUDGE

PATRICIA ANN BLACKMON, A.J., CONCURS.

ANN DYKE, J., DISSENTS WITH OPINION.

(\*SITTING BY ASSIGNMENT: Judge James D. Sweeney, Retired, of the Eighth District Court of Appeals.)

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

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ANN DYKE, J., DISSENTING:

{¶ 6} I respectfully dissent. Because Officer Saco testified that he immediately recognized the object in defendant's pocket to be two rocks of crack cocaine, this search and seizure did not violate Defendant's Fourth Amendment rights.

{¶ 7} In *Minnesota v. Dickerson* (1993), 508 U.S. 366, 375, 113 S.Ct. 2130, 124 L.Ed.2d 334, the United States Supreme Court recognized a "plain feel" exception to the warrant requirement that is analogous to the plain view exception:

{¶ 8} "When an officer feels an object during a Terry-authorized pat-down and the identity of that object is immediately apparent from the way it feels, the officer may lawfully seize the object if he \* \* \* has probable cause to believe

that the item is contraband - that is, if the 'incriminating character' of the object is 'immediately apparent.'"

{¶ 9} However, the Court cautioned that the officer may not manipulate the object, which he has previously determined not to be a weapon, in order to ascertain its incriminating nature. *Id.* at 378. The incriminating nature of the object must be "immediately apparent" and give rise to probable cause to believe the item is contraband. *Id.*

{¶ 10} In *Minnesota v. Dickerson*, *supra*, the Court noted that the arresting officer testified as follows:

{¶ 11} "I felt a lump, a small lump, in the front pocket. I examined it with my fingers and it slid and it felt to be a lump of crack cocaine in cellophane."

{¶ 12} The Court then concluded that the plain feel exception was inapplicable and noted:

{¶ 13} "\* \* \* the Minnesota Supreme Court, after 'a close examination of the record,' held that the officer's own testimony 'belies any notion that he "immediately"' recognized the lump as crack cocaine. See 481 N.W.2d at 844. Rather, the court concluded, the officer determined that the lump was contraband only after 'squeezing, sliding and otherwise manipulating the contents of the defendant's pocket' -- a pocket which the officer already knew contained no weapon."

{¶ 14} Similarly, where the officer testifies that he merely suspects that the object is crack cocaine and then manipulates it

further, an unreasonable search and seizure has occurred. *State v. Lander* (January 21, 2000), Montgomery App. No. 17898. See, also, *State v. Robinson*, Hamilton App. No. C-000135.

{¶ 15} If, however, the officer establishes that the incriminating nature of that object was immediately apparent to him, he may permissibly retrieve that contraband. *State v. Phillips*, 155 Ohio App.3d 149, 2003-Ohio-5742, 799 N.E.2d 653; *State v. Stewart*, Montgomery App. No. 19961, 2004-Ohio-1319; *State v. Bostick*, Cuyahoga App. No. 81900, 2003-Ohio-3252; *State v. Chancellor* (Jan. 21, 2000), Montgomery App. No. 17560.

{¶ 16} In this instance, Officer Saco testified that he has made over 2,500 arrests for possession of crack cocaine and touches it "almost daily." (Tr. 15). As to this particular matter, he stated that he "knew that they were crack cocaine immediately" (Tr. 15) and "as soon as my hand touched that piece of paper in her pocket I immediately recognized it to be two rocks of crack cocaine." (Tr. 14).

{¶ 17} I would therefore conclude that he did not conduct an unreasonable search or seizure and that defendant's Fourth Amendment rights were not violated.