University of Baltimore Law Forum

Volume 43
Number 2 *Spring 2013*

Article 5

2013

Recent Developments: McCracken v. State: A Law Enforcement Officer Does Not Violate the Fourth Amendment When He or She Seizes Items Discovered on a Suspect during a Lawful Terry Stop and Frisk if There Is Probable Cause to Believe That the Items Are Contraband or Evidence of a Crime

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RECENT DEVELOPMENT

MCCRACKEN V. STATE: A LAW ENFORCEMENT OFFICER DOES NOT VIOLATE THE FOURTH AMENDMENT WHEN HE OR SHE SEIZES ITEMS DISCOVERED ON A SUSPECT DURING A LAWFUL *TERRY* STOP AND FRISK IF THERE IS PROBABLE CAUSE TO BELIEVE THAT THE ITEMS ARE CONTRABAND OR EVIDENCE OF A CRIME.

By: Dominic W. Lamartina

The Court of Appeals of Maryland held it was not a violation of the Fourth Amendment when a law enforcement officer seized a car remote discovered during a *Terry* frisk and the officer knew enough facts to prove the remote was part of the underlying crime. *McCracken v. State*, 429 Md. 507, 56 A.3d 242 (2012). The court emphasized the use of a totality of the circumstances analysis in making a probable cause determination. *Id.* at 519-20, 56 A.3d at 249.

On September 18, 2010, Baltimore City police responded to a report of an armed individual in East Baltimore. Officer Adrian McGinnis ("Officer McGinnis") arrived at the scene and observed Reginald McCracken ("McCracken") arguing with a woman on the front porch of a residence. Officer McGinnis spoke with the woman who stated that McCracken "hacked" her to the present location, during which time the two argued and McCracken threatened to shoot her. Officer McGinnis recognized the term "hacked" to mean an "illegal transport of a person in exchange for money without a taxi license."

Officer McGinnis spoke with McCracken, who denied the hacking allegations but made inconsistent statements as to how he got to his location. Officer McGinnis conducted a frisk and felt what he believed to be car keys and a car remote. He removed the car remote from McCracken's pocket, and pressed its alarm button activating a car alarm nearby. After shining a flashlight in the window of the car, Officer McGinnis observed and seized a black handgun from the open glove compartment.

Police arrested McCracken for illegally transporting a handgun in a motor vehicle. Prior to the trial before the Circuit Court for Baltimore City, McCracken moved to suppress the keys and car remote, arguing that their seizure went beyond the scope of the "plain feel" doctrine, and that the gun was the fruit of an unlawful seizure. The court denied the motion.

The court found McCracken guilty of illegally transporting a handgun in a motor vehicle. McCracken appealed the conviction to the Court of Special Appeals of Maryland. The intermediate appellate court affirmed

the judgment of the circuit court. The Court of Appeals of Maryland granted McCracken's petition for writ of certiorari.

On review, the Court of Appeals of Maryland will not disrupt the factual findings of the circuit court unless found to be "clearly erroneous, but conducts its own constitutional appraisal of alleged Fourth Amendment violations." *McCracken*, 429 Md. at 515, 56 A.3d at 246 (citing *Crosby v. State*, 408 Md. 490, 504-05, 970 A.2d 894, 902 (2009)). McCracken's sole contention on appeal concerned the scope of the "plain feel" doctrine during a lawful frisk. *McCracken*, 429 Md. at 513, 56 A.3d at 425. The court began its analysis by applying the "plain feel" doctrine as recognized in the Supreme Court of the United States case of *Minnesota v. Dickerson*. *McCracken*, 429 Md. at 515, 56 A.3d at 246-47 (citing *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993)). The "plain feel" doctrine is an expansion of the Supreme Court's plain view rule, which permits a law enforcement officer to seize an item or items discovered during a valid *Terry* stop and frisk, if there is probable cause to believe that the item or items is either contraband or "immediately apparent" evidence of a crime. *McCracken*, 429 Md. at 516, 56 A.3d at 247 (citing *Dickerson*, 508 U.S. at 375).

In *Dickerson*, the Supreme Court concluded that law enforcement officers, following a lawful *Terry* stop and frisk, exceeded the scope of the "plain feel" doctrine because it was not "immediately apparent" that the lump in the defendant's pocket was contraband. *McCracken*, 429 Md. at 517, 56 A.3d at 247-48 (citing *Dickerson*, 508 U.S. at 378-79). Rather, the probable cause arose after the officer squeezed and manipulated the contents of the defendant's pocket. *McCracken*, 426 Md. at 517, 56 A.3d at 248 (citing *Dickerson*, 405 U.S. at 378-79). In attempting to analogize the facts of his case to that of *Dickerson*, McCracken asserted that it was not immediately apparent that his keys and car remote were part of a crime and, therefore, law enforcement illegally seized the items. *Id.*

In rejecting McCracken's contention, the court determined it was immediately apparent that the keys and car remote were evidence of a crime, and Officer McGinnis needed no further search to develop facts indicating the items' connection to illegal activities. *McCracken*, 429 Md. at 518-19, 56 A.3d at 248-49. In making this determination, the court pointed out that Officer McGinnis was aware prior to the *Terry* frisk that McCracken was in a location not near his residence, he gave inconsistent statements as to how he arrived at the current location, and his alleged victim accused him of hacking, an action which by its nature involved a car. *McCracken*, 429 Md. at 519, 56 A.3d at 249. Based on these facts, the court concluded when Officer McGinnis conducted the *Terry* frisk, there was sufficient evidence to believe that the keys and car

remote were immediately apparent to be evidence of McCracken's alleged hacking. *McCracken*, 429 Md. at 519, 56 A.3d at 249.

Although McCracken acknowledged that the facts known to Officer McGinnis at the time of frisk could give rise to a reasonable suspicion that the keys and car remote were evidence of hacking, he asserted that the circumstances were insufficient to establish probable cause. *McCracken*, 429 Md. at 519, 56 A.3d at 249. Relying on Supreme Court precedent, the Court of Appeals of Maryland emphasized that probable cause is a "fluid concept . . . incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances." *McCracken*, 429 Md. at 519, 56 A.3d at 249 (citing *Maryland v. Pringle,* 540 U.S. 366, 370-71 (2003)). According to the court, the important question to ask in determining probable cause is whether the totality of the circumstances would lead a reasonable police officer to believe the item felt was evidence of the crime. *McCracken*, 429 Md. at 520, 56 A.3d at 249 (citing *Pringle,* 540 U.S. at 370). Based on the facts learned by Officer McGinnis prior to conducting the frisk, the court concluded that under the totality of the circumstances a reasonable police officer would have probable cause to immediately believe the items felt during the pat-down were a pair of keys and car remote belonging to the car McCracken used in the alleged hacking. *McCracken*, 429 Md. at 520-21, 56 A.3d at 250. Thus, Officer McGinnis was within his authority to seize the items. *Id.*

In *McCracken*, the Court of Appeals of Maryland reinforced the longstanding principle of the *Terry* search. The totality of the circumstances test expands *Terry* by giving deferential treatment to police officers conducting searches. This is important for Maryland practitioners to consider because the Fourth Amendment's exclusionary rule has historically been a strong protection for criminal defendants. With the narrowing of the rule, defense attorneys require redirection of their attention, as facts are more important now than ever. One cannot simply point to a previously decided case and argue that it involved the same situation and thus should have the same result. This case-by-case test makes a major impact on the worth of precedent in criminal litigation. Defense attorneys now have to do more fact finding if they want to make an exclusionary rule argument. They must be prepared to emphasize the facts in their favor and rebut the facts which are not. The slightest oversight of a particular fact may doom their client.