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## State v. Johnson

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### Lumps of Coal, Lumps of Crack

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Most of you have probably heard the story of how Santa Claus puts goodies in the stockings belonging to good children, but lumps of coal in the stockings of bad kids. Perhaps you have even threatened or been threatened with something similar around Christmas. But have you ever stopped to consider why coal is associated with being a bad child? Of course you haven't, which makes it a great theme for the last legal update of 2019!

The truth is that no one really knows how this tradition got started.<sup>1</sup> Early literature referred to "switches"<sup>2</sup> and ashes being left for bad children in lieu of toys. It is thought that the ashes were just readily available from the fireplace that Santa had just come down and that this changed to coal once it was being used for heat around the turn of the 20<sup>th</sup> century. However, there are also sources that depict poor families being very happy to receive a lump of coal in their stocking because it meant they would have heat, but that idea diminished as coal became a cheap commodity by the 1920s. Whichever story you go with, I always found that threatening to give my kids only socks and underwear for Christmas was an effective deterrent, at least until they went away to college. Then they were really happy to receive something useful like that.

Our case today deals not with lumps of coal, but with lumps in a suspect's pocket felt during a Terry frisk.<sup>3</sup> As you know, a frisk is a search of a person's outer clothing done to ensure a person is not concealing a weapon.<sup>4</sup> A frisk may be conducted with consent or if the officer has legally detained the subject and has reasonable suspicion to believe he or she is armed and dangerous. Under the well-established plain feel doctrine,<sup>5</sup> if the officer feels an object during the frisk which is "immediately apparent" to him or her to be contraband, the officer may then seize the item. But how do we evaluate whether the object felt by the officer was really "immediately apparent" as contraband? That was the question in the recent N.C. Court of Appeals case of State v. Johnson.<sup>6</sup>

In Johnson, a Sheriff's Office Captain was doing what captains do best, minding his own business while stopping at a gas station to purchase a cup of coffee. Captain Pittman was a 25 year veteran and had previously spent approximately eight years on patrol where he had frequently encountered individuals who possessed controlled substances which he had been trained to identify. While purchasing his coffee, he observed our defendant having a loud and profane cellular phone conversation right outside of the gas station. The clerk expressed concern that the man was bothering other customers with his rude behavior so the Captain called for a backup officer and approached the defendant.

<sup>1</sup> Similar to how no one really knows how to implement this year's new victims' rights legislation, but I digress.

<sup>2</sup> Are you folks too young to know what a "switch" is? I hope not. But just in case, there was a time when parents would discipline their children by whipping them on the buttocks with a switch, which was a thin, flexible branch of a tree. So leaving a switch in your kid's stocking was the Christmas equivalent of the old Mafia routine of delivering a bullet to someone with their name on it.

<sup>3</sup> You may be wondering why we put gifts in stockings by the fire at all – it seems like a creepy thing to do. The legend is that Saint Nicholas knew of a poor family that could not afford a dowry for the three daughters to get married. Knowing the father would be too proud to accept money, Nicholas threw three bags of gold coins down the chimney overnight and a bag fell into each of the three daughters' stockings which were hung by the fire to dry.

<sup>4</sup> Terry v. Ohio, 392 U.S. 1 (1968).

<sup>5</sup> Minnesota v. Dickerson, 508 U.S. 366 (1993).

<sup>6</sup> COA 19-18 (December 17, 2019).

Captain Pittman identified himself as an officer and told the defendant that “he needed to finish his conversation elsewhere, and that it was inappropriate to be using that kind of language in front of the gas station.” The defendant became very nervous, shifting from foot to foot and looking side to side. The Captain would later testify that “his nervousness made me nervous” and he became concerned the defendant might pose a danger so he asked for consent to pat him down for weapons. After hesitating, the defendant gave consent for the frisk.

While conducting the “flat-handed pat-down,” the Captain felt a “soft, rubbery item like a wad of rubber bands” in the defendant’s pocket and testified that it was “immediately apparent to him that was associated with the packaging normally used to package and sell narcotics.” When he retrieved the item, it was three tied up plastic bag corners containing a white, powdery substance he believed to be cocaine, as well as a tube of Orajel liquid. After a field test came back negative, the defendant helpfully volunteered that it was baking soda and that “he had the Orajel to mix with the baking soda to fool potential buyers into believing the substance was cocaine.”<sup>7</sup> The SBI later confirmed the substance was baking soda, but the defendant was convicted of Possession with Intent to Sell and Deliver a Counterfeit Controlled Substance.

On appeal, defendant’s argument that he was unconstitutionally seized by Captain Pittman was quickly dismissed. The court saw this as a voluntary encounter that did not require a reasonable suspicion. Despite the defendant’s claim that he “was cornered against the gas station wall, unable to leave, with two readily-identified police officers making demands,” the court pointed out that there was no evidence that “defendant’s egress<sup>8</sup> was in any way obstructed.” In fact, the court said, the record showed the captain encouraged the defendant to leave and “finish his conversation elsewhere.” It was only after defendant hesitated and began acting very nervous that the captain asked for consent to frisk.

More complicated was the question of whether the “wad of rubber bands” was immediately apparent as a matter of law to Captain Pittman to be contraband. The court considered three previous cases when considering this point. First was State v. Richmond,<sup>9</sup> where the court held that an officer who felt small bags in the defendant’s pocket had probable cause under plain feel to seize them. In that case, the following exchange took place between the defense attorney and the officer:

*[Defense counsel:] So, if your hands are out, then how could you determine that what was in his pocket was some sort of contraband?*

*[Officer:] Through six years of doing this job, knowing what it feels like.*

*Q: What did it feel like?*

*A: A knot of lumps. I don’t know how else to describe it to you.*

*Q: Did you have your hands out – just with your hands flat out, you could feel a knot of lumps?*

*A: Yes, ma’am. They got good feeling in them.<sup>10</sup>*

The court found that based on the officer’s training and experience and testimony that he had discovered this same type of thing many times, it was immediately apparent to him that the lumps<sup>11</sup> in defendant’s pockets were a controlled substance and the seizure was justified.

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<sup>7</sup> The smart ones are usually harder to catch. And less honest and forthcoming. I would say the defendant showed a lot of integrity here if it weren’t for the whole plan to lie to customers about what he was selling them.

<sup>8</sup> New Year’s Resolution #1: Use the word “egress” as much as possible. “Ingress” also.

<sup>9</sup> 215 N.C. App. 475 (2011).

<sup>10</sup> I feel obligated to say that I am sharing this for educational purposes only and as a police attorney, I most certainly cannot condone this last sarcastic statement made by the witness. But I will admit it made me chuckle a bit.

<sup>11</sup> It could be worse than a lump of coal in your stocking. There are a couple of legends that are much more sinister. In parts of France and Belgium, Santa is accompanied by a figure known as “Pere Fouettard” who started out as an innkeeper who drugged and murdered schoolchildren and then made stew out of them. St. Nicholas brought the children back to life and now he gives gifts to the good children while “Pere” gives misbehaving kids a beating. There is also the Christmas demon of Austria named Krampus who might kidnap and eat bad children at Christmas. And we wonder why our kids have trouble going to sleep on Christmas Eve.

However, in a second case, State v. Beveridge,<sup>12</sup> the officer felt only a large size plastic bag rolled up in the suspect's pocket and testified that he didn't know it contained contraband until he "asked the defendant to turn out his pockets and show him the contents of his hands." Because the shape of the bag differed from the "traditional cluster of lumps" that officers in other cases had immediately recognized as bags of narcotics, it could not be said that the item was immediately apparent as contraband unless there were other surrounding circumstances more indicative of illicit drug activity. But what did that mean?

The court answered that question more fully in another case, State v. Briggs.<sup>13</sup> In Briggs, an officer felt a hard, cylindrical shape<sup>14</sup> in the defendant's pocket which he said felt like a cigar holder. After seizing it, he found ten crack rocks inside and placed the defendant under arrest. When the defendant argued that the only thing "immediately apparent" to the officer was that it was a cigar holder which is not illegal to possess, the court looked at the surrounding circumstances to uphold the plain feel seizure. The officer knew Briggs as someone he had previously arrested for drug charges, knew him to be on probation, and knew he had previously been convicted of drug offenses more than once. The defendant denied drinking or taking drugs but had glassy and blood-shot eyes. The officer had already asked him about the smell of burned cigar tobacco in the car he had been in and the defendant stated he didn't smoke cigars which made it hard to explain the cigar holder in his pocket. Based on the totality of all of these circumstances along with the officer's testimony that he had learned that people frequently used cigar holders to keep their controlled substances in, the court agreed with the officer that it was immediately apparent the cigar holder held contraband and clarified that "immediately apparent" is equal to the "probable cause" standard.

Applying the concepts of these three cases to Johnson, the court ruled that Captain Pittman had probable cause to believe the lumps were contraband (meaning it was "immediately apparent") and the seizure was constitutional. The court pointed out that where an officer knows from experience that the item felt is identical to a common method of packaging narcotics, probable cause can exist even without surrounding circumstances indicating illicit drug activity. As the item itself becomes more ambiguous like the cigar holder in the case above or for example, a pill bottle that might contain a valid prescription, there must be additional circumstances present that would give rise to probable cause sufficient to make it immediately apparent that the item is contraband. Put another way, the fewer surrounding circumstances pointing to drug activity that are present, the more clear the items felt during the frisk need to be.

One final note I would make on this issue concerns the importance of the officer's testimony. The cases that are upheld in this area are almost always marked by an officer giving very detailed testimony of either exactly what he or she felt during the frisk and why based on training and specific experience it was clearly contraband or very detailed testimony about other specific circumstances and how they pointed to the presence of drugs. This attention to detail is a skill that you have to practice both when writing your report and when testifying on the witness stand, but good articulation often makes the difference between a successful and an unsuccessful prosecution.

With that, I wish you a Merry Christmas! I hope that you get lots of great things with no coal in your stocking.<sup>15</sup> As for me, I'm looking forward to some new socks and underwear.

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<sup>12</sup> 112 N.C. App. 688 (1993).

<sup>13</sup> 140 N.C. App. 484 (2000).

<sup>14</sup> Just stop it.

<sup>15</sup> Maybe you actually want coal in your stocking. It's being sold on the internet as good for school projects, crafts, displays, or decorations. The reviews show, however, that most people buy it as a gag Christmas gift.

**ABOUT THE AUTHOR: Brian Beasley is the Legal Advisor for the High Point Police Department. This legal update is provided free of charge to the SR Webpage in the hopes that officers across the state would be able to benefit from it. Brian is not an attorney with Smith Rodgers, PLLC but he thinks they're pretty cool guys.**



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