

Hide and Go Seek: The Plain Feel Doctrine Legal Question of the Week Vol. 3, Number 13 July 9, 2010

Brian Beasley¹
Hidden In A Sea of Humanity
and Legal Adviser, HPPD

I'm sure that everyone while growing up has played games of "Hide and Seek."² You probably wouldn't be surprised to learn that there are several variations of this game found worldwide.³ I'm sure you have also realized that as adults, we continue to play this game when it suits our needs. At different times, we might hide from our supervisor, hide from the bill collectors, or hide from our spouses and kids. How interesting that we learned these important life skills playing a game on the playground.

Criminals today play their own version of Hide and Seek with the police. They try to find ways, places, containers, and crevices in which to hide their drugs and officers are tasked with finding them. Fortunately, a law enforcement officer has a valuable tool available to him or her in this struggle – the "plain feel" doctrine.

The plain feel or plain touch doctrine is an offshoot of the more common "plain view" doctrine.⁴ As you (should) know, the plain view doctrine says that an officer may seize an object if:

1. He is lawfully in a position from which he views the object;
2. The object's incriminating character is immediately apparent – meaning the officer has probable cause that the object is evidence of a crime; and
3. The officer has a lawful right of access to the object.

¹ Hey – remember that time CourtTV did an hour long primetime special at my request so that I could announce whether I was taking this job and signing with the City of High Point or staying at the District Attorney's office? Yeah – me neither. No one would be that arrogant, would they?

² I prefer the name "Hide and Seek" to the alternate name of "Hide and Go Seek." You might ask why I used the "Hide and Go Seek" variant in the title. It's because I liked the meter better. Remember back in high school English class when you studied the meter of poetry, meaning the number and stress of the syllables used in each line? No? Well, I was the guy who paid attention to stuff like that simply because I thought it was fun to say phrases like "iambic pentameter." You can tell why I had so many girlfriends back then.

³ In probably the earliest version, players try to remain hidden the longest and may move to other hiding spots while "it" isn't looking.

⁴ After all, why should the other senses be discriminated against? Other doctrines include "plain smell" (which I wrote about in "Oooh, That Smell!" 2 L.Q.O.W. 7 (2009)) and "plain hearing." I haven't seen a case dealing with "plain taste" but there may be one out there somewhere. See also 1 Cor. 12:14-20.

In the U.S. Supreme Court case of Minnesota v. Dickerson,⁵ an officer stopped the defendant and frisked him based on reasonable suspicion.⁶ During the frisk, he felt a small, hard object wrapped in plastic in the defendant's jacket pocket which he knew was not a weapon. After "squeezing, sliding and otherwise manipulating"⁷ the contents of the defendant's pocket," the officer determined that the lump was cocaine and seized it.

In an interesting opinion, the Court ruled that the seizure of cocaine was unconstitutional because the officer's continued manipulation of the lump after he could tell it was not a weapon was an additional search not justified by probable cause. However, the Court held that if it had been immediately apparent⁸ that it was cocaine at the time the officer touched the item, the seizure would have been justified under a plain feel analysis.

Since the Dickerson opinion, courts across the country have been split on a question left unanswered by the Supreme Court. The question is whether the immediately apparent nature of an object must be determined solely based on how the object feels or whether the officer (and subsequently, the court) can take into account the totality of the circumstances, including the officer's training and experience.

This was the issue in the North Carolina Court of Appeals case, State v. Briggs.⁹ In Briggs, officers with the Concord Police Department were conducting a driver's license check shortly after midnight. Briggs was stopped at the checkpoint and an officer recognized him as someone he had previously arrested for drug charges, knew him to be on probation, and knew he had been previously convicted on drug charges on more than one occasion. The defendant denied that he had been drinking or taking drugs, but was chewing gum "real hard" and had glassy and blood-shot eyes. The officer smelled burned cigar tobacco from inside the vehicle (which the officer knew from training and experience was often used to mask the smell of illegal drugs) but the defendant stated he didn't smoke cigars and told the officer that a female in the car earlier had smoked one.

Based on this, the officer required the defendant to exit the vehicle and conducted a pat down frisk. The officer later testified that while frisking the defendant, he "felt a hard, cylindrical shape in [the defendant's] pocket and it felt like a cigar holder; and I'm familiar with these because folks carry these frequently to keep their controlled

⁵ 508 U.S. 366 (1993). In a more active (and more common, I think) version of hide and seek, it is combined with "tag." There is a home base that the hiders try to get to while the seeker is out seeking for them. If the person who is "it" tags someone before they reach home base, the tagged person becomes "it" and the original calls out "Olly Olly Oxen Free!" which was originally "All ye all ye outs in free," which makes only a little more sense, but tells the other hiders to come out and start a new round.

⁶ Remember that the right to frisk is not automatic simply because you have reasonable suspicion to make a stop. You must also have a reasonable suspicion that the person is armed and presents a threat to your safety or the safety of others.

⁷ Little known fact: "Squeezing, Sliding, and Otherwise Manipulating" was a considered but ultimately rejected title for the Journey hit "Lovin' Touchin' Squeezin'."

⁸ Remember that immediately apparent equals probable cause.

⁹ 140 N.C. App. 484 (2000). A derivative game of Hide and Seek is "Sardines." In this game, only one person hides while all other players search. When a searcher finds the hider, he must hide with them. The last person to find the group that's hiding is the loser.

substances in.” The officer asked defendant what the object was and the defendant stated it was a cigar holder. The officer said, “I thought you didn’t smoke cigars,” and removed the cigar holder from defendant’s pocket. When he opened it, he found ten rocks of crack cocaine inside and placed the defendant under arrest.

At the motion to suppress, the defense attorney argued that the only thing immediately apparent to the officer when he touched the object was that it was a cigar holder, which is not illegal to possess. The State argued that based on the totality of the circumstances and the officer’s training and experience, the officer had probable cause to believe (i.e. it was “immediately apparent) that the cigar holder contained contraband and therefore the search was legal. The defendant lost in the trial court and appealed to the Court of Appeals.

The Court of Appeals looked at cases from other jurisdictions and past cases in North Carolina and determined that there was not a clear rule on this issue. However, they concluded that the “better-reasoned view [was] to consider the totality of the circumstances in determining whether the incriminating nature of the object was immediately apparent and thus, probable cause existed to seize it.” In reviewing this particular case, the Court held that the seizure was appropriate due to these important facts:

1. Defendant was stopped at a late hour in a high crime area;
2. Officer had previously arrested the defendant for drugs and knew he was on probation;
3. The burnt cigar smell and the officer’s knowledge of what that could mean;
4. The defendant’s appearance and behavior which suggested possible usage of a controlled substance; and
5. The officer’s knowledge that cigar holders were commonly used to store controlled substances.¹⁰

Because of this, the defendant’s conviction was upheld and the rule in North Carolina for plain feel is that the court will consider the totality of the circumstances in its determination of whether probable cause existed for a seizure.¹¹

The Bottom Line

When conducting a frisk, when an officer feels an object:

1. The officer may seize the object if the officer believes it is a weapon;
2. If the officer feels an object that is not a weapon, it is usually (if not always) a good idea to ask the subject of the frisk what the object is. If the subject admits that it is contraband, the seizure will of course be valid.
3. If the subject isn’t that helpful, the officer may seize the object under the plain feel doctrine if he has probable cause based on the totality of the

¹⁰ Please notice how wonderfully the officer articulated these facts to strengthen his case.

¹¹ If you (or the D.A. prosecuting your case) would like a newer case that sets out this rule, get State v. Robinson, 189 N.C. App. 454 (2008).

circumstances to believe that the object is illegal contraband or contains illegal contraband.

So ready or not, here we come!¹²

Brian T. Beasley

Police Attorney

High Point Police Department

¹² In Sweden, they play a hide and seek game called “burken.” In “burken,” if the seeker finds someone, he must beat that player back to home base and call out that person’s name. If he does this successfully, that person is “it” in the next round. However, if the last hider remaining can make it to home base and yell “burken är sparkad” which means “the can is kicked,” then “it” has to be “it” again. I don’t think I would be good at this game because I can’t pronounce “burken är sparkad” so I would never be able to win. I really only mentioned it so that I would have a chance to use an umlaut (the two dots over the “a” above) in one of my legal updates.