POLICE / PROSECUTOR UPDATE

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The Court of Appeals recently decided an interesting "plain feel" case. The court first examined the legality of the patdown search of the defendant. The facts indicate that a sheriff's deputy observed the defendant driving his car 78 m.p.h. in a 55 m.p.h. zone. The deputy stopped the defendant, smelled alcohol on his breath, and then asked him to get out of his car to take some field sobriety tests. The defendant failed one of the tests. The deputy administered a portable breath test which indicated the defendant had a BAC of .08. Before transporting the defendant to the county jail for a certified breath test, the deputy conducted a patdown search for his safety. During the patdown, the deputy felt a round, hard object that was 3 to 4 inches long. Based on his training and experience, the deputy recognized the object as a "one-hitter" - a pipe used to smoke marijuana. When the deputy removed the object from the defendant's pocket, he discovered it was not a pipe but a green leafy substance tightly rolled in a plastic bag. A field test was positive for marijuana.

The defendant contended there was no justification for the patdown. The law permits a police officer to approach a person for purposes of investigating possible criminal behavior without probable cause to make an arrest and to conduct a reasonable search of the person for weapons for the officer's protection. The officer need not be absolutely certain that the person is armed but only that a reasonably prudent man in the same circumstances would be warranted in the belief that his safety or that of others is in danger. Here the deputy escorted the defendant to the deputy's car for the purpose of transporting him to the jail. In the court's view, because at this point the deputy would be alone in his car with the defendant as he transported him to the jail, a reasonably prudent person in the same circumstances would be warranted in conducting a patdown of the defendant for his own safety.

Plain feel: The courts have determined that police officers may seize contraband detected through the officer's sense of touch during a protective patdown search. Two issues are dispositive as to the admissibility of contraband seized without a warrant under the "plain feel" doctrine: (1) whether the contraband was detected during an initial search for weapons rather than during a further search, and (2) whether the identity of the item or object is immediately apparent to the officer. Evidently, if the object is immediately apparent to the officer as contraband, the object is not rendered inadmissible if it turns out not to be the exact contraband the officer believed it was (although the court did not directly address this question). The court said that the deputy testified that during the initial patdown search conducted for his safety, he immediately recognized a "one-hitter" - which is a pipe used to smoke marijuana. IC 35-48-4-8.3 criminalizes possession of drug paraphernalia. Therefore, drug paraphernalia, such as a "one-hitter" the deputy *thought* (the court's word) he recognized in the defendant's pocket, would be contraband. Therefore, the marijuana was admissible. It will be interesting to see if the defendant tries to appeal this to the Supreme Court.

Burkett v. State, 691 NE2d 1241 (Ind. App. 1998).