IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE
ELEVENTH JUDICIAL DISTRICT
AT CHATTANOOGA

STATE OF TENNNESSEE )
)
VS. ) CASE NOS. 156341 & 156342
)
EDWARD JEROME HARBISON )
)
DEFENDANT. ) Death Penalty Case

# PETITIONER'S APPENDIX

Respectfully submitted,

Edward Jerome Harbison

Edward Jerome Harbison, #108926
Pro se Petitioner
RMSI, Unit 2, D-Pod Cell 109
Riverbend Maximum Security Institution
7475 Cockrill Bend Boulevard
Nashville, Tennessee 37209-1048

MR. STANLEY J. LANZO: DIRECT EXMINATION
OF:
CHARLES E. FOSTER: TRIAL TRANSCRIPTS Pp. 603-604

Q Now, after you had taken the confession from the defendant, did you get a consent to search - were you armed at that time with a search warrant of his vehicle for trace evidence?

A That's correct, we did have a search warrant for his vehicle. However, it was not for trace evidence. We did later obtain a consent to search from Jerome Harabison and also a search warrant for trace evidence on the search of his vehicle, 1975 Ford Elite.

STANLEY J. LANZO: DIRECT EXAMINATION
OF:
CHARLES E. FOSTER: TRIAL TRANSCRIPTS Pp. 543-544

Q All right, when was that done?

A It was done on the 21st of February, 1983.

Q Now, was it on the 21st - I forget the dates. What date was it that you recovered the vase here that ultimately turned out to be allegedly the murder weapon?

A Okay, that was also on the 21st about 3:40 p.m.

Q All right, after you had contact with Mr. Schreane, what's the next thing that occurred in this investigation?

A Okay, after we recovered the television set and the marble vase, approximately 5:30 p.m. on the 21st of February we located Jerome Harbison at 918 East Eighth Street. I believe Officer Swafford and Willhoit picked him up. He was brought to the Police Service Center on Amincola Highway.

Q He was at 918, Janet Ductett's home?

A That's right.

Q When you brought him in, approximately what time did you bring him to Headquarters?

A Okay, he was brought in approximately 5:45 p.m. is when they started to the Service Center with him, arrived shortly thereafter.

MR. LANZO: All right, may I approch the witness, Your Honor?

THE COURT: Yes.

Q I'll show you this instrument and tell me if you can identify this particular instrument?

A That's correct. This is a copy of the rights form which was administered to Edward Jerome Harbison on February the 21st, 1983.

Q All right, you might pick your voice up just a little bit. This I gather was after you had all this information and the background work that you had done, you brought him in again for questioning, is that correct?

A That's correct.

Q All right, did you advise him of his rights?

A Yes, we did.

Q All right, just demonstrate again how you advised him of his rights on this particular date, February 21st, 1983.

A Okay, this is a copy of the rights form executed by myself and Officer Larry Swafford at 7:20 p.m. on 2/21 of '83. The name is Edward Jerome Harbison, alias, Boo. Date of birth, 6/28/55. Address 918 East Eighth and 1111 Crutchfield Phone 765-3503. Social security number 409-13-8215. This is your Constitutional rights. Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be unsed against you in court. You have the right to talk to a lawyer for advice before we ask you any questions and have him with you during questioning. If you cannot afford a lawyer, one will be appointed for you before any questioning, if you wish. If you decide to answer questions now without a lawyer present, you still have the right to stop answering questions at any time. You also have the right to stop answering questions at any time until you talk to a lawyer. This was read to Jerome Harbison and he did acknowledge a waiver of his rights which said. I have read this statement of my rights and understand what my rights are. I'm willing to make a statement and to answer questions. I do not want a lawyer at this time. I understand and know what I'm doing. No promises or threats have been made to me and no pressure, force or coercion of any kind have been used against me. Signed Edward Jerome Harbison. 2/21/83. 7:20 p.m.

In my Trial Transcripts at page 543 relates to allege date, time I were brought in or picked up, as they called it, is the Direct Testimony of Detective Foster under both State, Federal law.

I contend it was approx. 4:15 PM is the time I were Arrested on 21st February 1983, at 918 East Eighth Street. A place were even the State and Police Officers acknowledged that I resided at, clearly this is a Payton v. New York, violation.

DIRECT EXAMINATION TRIAL TRANSCRIPT
BY MR. LANZO: AT PAGE 473
OF CHARLES E. FOSTER:

Q Now, you're using plural on Search Warrants. How did that work? Just tell the Jury what your plan was and what you were doing?

A Okay, at the time of the initail -- the initial Warrants were drawn, I took a Warrant to 918 East Eighth Street and also a Warrant for 1111 Cructhfield Street, which covered the residence of Jerome's girl friend and his father where he had been living.

DIRECT EXAMINATION TRIAL TRANSCRIPT
BY MR. LANZO: AT PAGE 444
OF CHARLES E. FOSTER:

Q All right, just demonstrate again how you advised him of his rights on this particular date, February 21st, 1983.

A Okay, this is a copy of the rights form executed by myself and Officer Larry Swafford at 7:20 p.m. on 2/21 of "83. The name Edward Jerome Harbison, alias, Boo. Date of birth, 6/28/55. Address 918 East Eighth and 1111 Crutchfield.

Harbison's documented Trial Records reflects Evidence and facts showing Harbison was apparently living at 918 East Eighth Street, Chattanooga, TN 37403 at the time in question February 21, 1983. Bonds v. Cox, 20 F.3d 697, 701 (6th Cir. 1994) (Expectation of Privacy and Standing); Payton, 445 U.S. 573, 576 violation.

In U.S. v. Bradley, 922 F.2d 1290, 1293-95 & nos. 4, 5 (6th Cir. 1991), appealing after remand, 983 F.3d 1069, appeal after remand, 25 F.3d 1050, the Court held: "Under the law of the State of Tennessee Officers are required to obtain a Warrant to effect a valid Arrest of a person in the person's own home."

It was argued by State and Detective Foster at Harbison's Motion to Suppress, it was argued that the investigation had came to a point were they wanted Harbison picked up again. See: [DISTRICT ATTORNEY"S FILES #0000066 at lines 2 -15], reflects the Officers Deliberate Intentions of February 21, 1983.

DIRECT EXAMINATION — MOTION TO SUPPRESS
BY STANLEY LANZO: — AT PAGES 13 - 14
OF CHARLES E. FOSTER

Q What did you do or do you remember?
A Okay, I advised Chief Davis that I felt like the investigation had come to a point where we did need to discuss the incident with Mr. Harbison again and Chief Davis came to the Police Service Center at which time he questioned Mr. Harbison for a short period of time.
Q. Now, Chief Davis was your Superior at the time, is that correct?
A That's correct.

DIRECT EXAMINATION — TRIAL TRANSCRIPT
BY MR. LANZO: — AT PAGES 543 - 544
OF CHARLES E. FOSTER

Q All right, after you had that contact with Mr. Schreane, what's the next thing that occurred in this investigation?
A Okay, after we recovered the television set and the marble vase, approximately 5:30 p.m. on the 21st of February we located Jerome Harbison at 918 East Eighth Street. I believe Officer Swafford and Willhoit picked him up. He was brought to the Police Service Center on Amnicola Highway.

That in the Affidavit submitted by State and Officers states as follows: ["Affiant further affirms that he has receive information from Edward Jerome Harbison's father, James Harbison, that he maintains two residences in Hamilton County, one with his father and located at 1111 Crutchfield Street in Hamilton County, and one with Janice Duckett located at 918 8th Street, Chattanooga, Tenn. See [STATES EXHIBIT NOS. 2-4].

After reviewing Affidavit's each state the same that I maintained two residences, after reviewing My Records I find its hard to say I did not Enjoy an Expectation of Privacy at 918 East Eighth Street, Chattanooga, TN 37403.

CROSS EXAMINATION
BY LANZO:
OF CHARLES E. FOSTER:

TRIAL TRANSCRIPTS
AT PAGE 544

Q All right, just demonstrate again how you advised him of his rights on this particular date, February 21st, 1983.

A Okay, this is a copy of the Rights Form executed by myself and Officer Larry Swafford at 7:20 p.m. on 2/21 of '83. The name is Edward Jerome Harbison, alias, Boo. Date of birth, 6/28/55. Address 918 East Eighth Street and 1111 Crutchfield. Phone, 756-3530. Social Security number 409-13-8215.

[TRIAL TRANSCRIPT AT PAGE 550]

MR. LANZO:

(Whereupon, the following tape recording was played to the Jury in open Court.)

'This will be the statement of Edward Jerome Harbison, alias Boo, black male, date of birth, 6/28/55. Lives at 918 East Eighth Street and 1111 Crutchfield. Phone, 756-3530. Social Security number 409-13-8215. Statement taken 3300 Amnicola Highway on 2/21/83, approximately 7:55 p.m. by Investigator Ed Foster and Chief Pete Davis.

Armes

# Improper arrest halts arson case

## Former firefighter freed after ruling his arrest charges likely will be refiled

BY BRYAN MITCHELL
mitchellb@knews.com

A former Roane County fire captain accused of burning a Midtown church won a fleeting moment of freedom Tuesday when a judge threw out an arson charge against him.

Less than two hours later, however, authorities took him back to jail.

Defense attorney Mike Ritter vowed Tuesday night to seek an emergency writ in federal district court in Knoxville to free Glen Armes, 37. Ritter said prosecutors improperly ordered Armes' detention without a judge's approval.

"Why issue an order to re-arrest him when you have no authority to do it," Ritter said.

Armes, however, had other prior arson charges still pending in Roane County that date to June. He had been free on bond on those charges, but bond was revoked after his January arrest in the church fire, authorities said.

His release Tuesday appeared to be a mistake.

Prosecutors could not be reached for comment Tuesday night.

The former Kingston fire department captain's fortunes appeared to brighten earlier Tuesday when Roane County General Sessions Court Judge Dennis W. Humphrey issued a ruling dismissing the arson charge as well as burglary and drug possession charges.

See ARSON on A8

**THE CHARGES**

■ **What's new:** Judge dismisses arson, burglary and drug possession charges against Glen Armes.

■ **What's next:** The district attorney could present the same charges to a grand jury next week.



## ARSON

from A1

Humphrey ruled that Roane authorities wrongly arrested Armes on Jan. 1 following a fire at the Memorial Free Method st- Church on Poland Hollow Road.

"There were no specific or articulable facts to justify the defendant's being seized ... and as a result of the improper arrest any evidence obtained as a result thereof is inadmissible," Humphrey wrote.

The judge's ruling followed a preliminary hearing held Monday for Armes in Roane County.

After Armes' release from jail Tuesday, the Roane County sheriff said he expected District Attorney General Scott McCluen to present the same arson, burglary and drug charges to a grand jury next week.

"Apparently (Humphrey) didn't hear the right kind of testimony to bind this man over," Sheriff David Haggard said. "There's a great possibility we'll have another go at this next week."

Armes' case stems from a series of events New Year's Eve. Roane County Sheriff's Deputy Randy Scarborough Jr. encountered Armes when Armes was involved in a car accident on Poland Hollow Road. The men were acquaintances.

A few hours later, Scarborough pulled Armes over for speeding but let him go after Armes said he cut himself and was rushing to buy bandages.

Minutes later, Scarborough responded to a fire call at Memorial Free Methodist Church. While firefighters fought the blaze, Scarborough said he spotted Armes, who lives within view of the church.

"The deputy attempted to direct Mr. Armes by waving a flashlight to come toward the deputy," Humphrey's ruling reads. "Glen Armes got into his vehicle and drove away and the deputy pursued."

It's unclear what exactly occurred next. Regardless, the judge ruled Tuesday that events were insufficient to warrant Armes' arrest.

Deputy Scarborough's testimony was that he intended to take Mr. Armes into custody for an interrogation and maintained he had not arrested Mr. Armes, though he testified he placed handcuffs on the defendant," the ruling states.

Armes was taken to jail where he was read his Miranda rights. He waived those rights in writing and allegedly confessed to starting the church fire, the judge wrote.

"As for the outstanding theft charge against Armes, Ritter argues the search of Armes' home by HPD investigator Randy Heidle was illegal, negating a warrant that accused Armes of stealing a thermal-imaging camera and chainsaw. The items were valued at more than $10,000.

Someone stole the items Nov. 10, 2004, from the Kingston Fire Department.

Ritter said Heidle executed the search outside of HPD's jurisdiction because Armes resides outside Harriman city limits. Hence, the search is unconstitutional, Ritter argues.

The Harriman Police Department could not be reached for comment.

At the time of his arrest in January, Armes was out of jail on bond facing charges that he allegedly set fire to three mobile homes in June.

Bryan Mitchell may be reached at 865-342-6306.

*336977 SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.

**STATE of Tennessee, Appellee,**
**v.**
**Nathaniel WHITE, Appellant.**

No. 03C01-9408-CR-00277.
Court of Criminal Appeals of Tennessee, at Knoxville.
June 7, 1995.

John E. Herbison, Nashville, TN

Leslie S. Hale, Blountville, TN

Amy Tarkington, Nashville, TN

Carl K. Kirkpatrick and David Overbay, Blountville, TN

OPINION

HAYES.

**1 The appellant, Nathaniel White, appeals from convictions for simple possession of marijuana and possession of cocaine with intent to sell entered in the Criminal Court for Sullivan County. The appellant raises three issues. First, the appellant contends that due to an invalid indictment the trial court lacked jurisdiction to convict the appellant for the misdemeanor offense of possession of marijuana. Second, the appellant avers that the trial court improperly admitted evidence seized in violation of the appellant's constitutional rights. Finally, the appellant argues that the sentence imposed by the trial court is excessive.

After a review of the record, the judgments of conviction for both offenses are vacated and the charges are dismissed.

I. *Facts*

On the night of August 27, 1993, Officer Robert Abernathy, head of the narcotics and vice unit of the Kingsport Police Department, received information from a confidential informant that two or three African-American subjects were in the Riverview Community in Kingsport selling crack cocaine from a white Toyota Camry with a New York license plate. Officer Abernathy received the same information from a fellow police officer, who had also been supplied with this information by a confidential informant. At approximately 10:00 p.m. the next evening, Abernathy again received information from a confidential informant that the same subjects were selling cocaine in the same area. (FN1) At the suppression hearing, Officer Abernathy testified that he: was told by the informant at approximately 10:00 p.m. that at that time that there was a white Toyota Camry in the Riverview area bearing a New York license plate and the last three numbers of that license plate were the number one hundred, one zero, and that from that vehicle there were two individuals according to their approximate height, weight and clothing description, and that they were, in fact, selling crack cocaine from that vehicle on the street. And I believe the way the informant put it, in front of Sarge's, which is a restaurant type place that sells beer and stuff on Lincoln Street in Kingsport. The informant gave me a very good description of the clothing that the subjects were wearing. The informant also told me that the subject that was wearing the yellow mesh tee shirt had a gun, was carrying a gun, and ... that the other individual, the one in black ... was somehow carrying the crack and I do not remember the exact wording of that.

Abernathy also testified that the informant had given him information in the past that had proved reliable, true and correct, and had led to the seizure of cocaine. However, Abernathy never testified as to how the informant gathered his information, and, at one point, indicated that the informant had not stated that he had personally observed any criminal activity.

Approximately forty-five minutes after receiving the second tip, Officer Abernathy observed an automobile matching the description given to him by the informant. The car had a New York license plate, the last three digits of which were one-zero-zero. Two of the occupants of the car matched the physical descriptions of the subjects given by the informant. Also present was a female, who was driving the car. Officer Abernathy ordered another officer to pull the car over. After the car was stopped, detective Glenn Martin ordered the appellant out of the vehicle. The appellant was wearing a black outfit as described by the informant. Detective Martin "patted down" the



APPENDIX O

O

appellant. As he felt in the appellant's crotch area, Detective Martin encountered a "hard round object." According to Martin's testimony at the suppression hearing, he knew immediately upon feeling the object that it was a film canister, and that based on his experience, he had a strong belief that it contained drugs. Martin stated "I think I've got the drugs," removed the opaque canister from the appellant's underwear and opened it. It contained cocaine and a small quantity of marijuana. The officers also found a .380 caliber handgun in an area of the car where the other subject, dressed in a yellow mesh shirt, had been bending over when the officers arrived. The officers arrested the appellant resulting in his indictment on one count of possession of cocaine with intent to sell, a class B felony, and one count of simple possession of marijuana, a class A misdemeanor.

**2 The appellant moved to suppress the evidence found in the film canister. After a suppression hearing, the trial court denied this motion. The grounds for the trial court's ruling are unclear from the record. However, the trial court's statements appear to indicate that it was of the opinion that the search was valid based upon a theory of either search incident to lawful arrest or an automobile search based upon probable cause.

A jury found the appellant guilty of both counts, and the trial court sentenced him to twelve years confinement for the felony cocaine possession conviction and eleven months, twenty-nine days for the misdemeanor marijuana possession conviction. The trial court ordered the sentences to be served concurrently.

II. *Validity of Count Two of the Indictment*

The appellant first challenges the validity of Count Two of the indictment, which charged him with simple possession of marijuana. Count Two states:

> The Grand Jurors for Sullivan County, Tennessee, duly empaneled and sworn, upon their oath present that NATHANIAL WHITE on the 28th day of August, 1993 in the State and County aforesaid and before the finding of this indictment did unlawfully possess a controlled substance as classified by the Tennessee Drug Control Act, to-wit: approximately .6 grams of Marijuana, a Schedule IV controlled substance, in violation of T.C.A. 39-17-418, ...

The appellant points out that the indictment fails to specify the requisite mental element, which is "knowing." *See* Tenn.Code Ann. § 39-17-418(a) (1994 Supp.). As a result, argues the appellant, not only is the indictment invalid, but also the trial court lacked jurisdiction to try the appellant. We agree.

It is a well established principle of law that the indictment must contain every element necessary to constitute the charged offense. *See, e.g., State v. Cornellison,* 59 S.W.2d 514 (Tenn.1933); *State v. Smith,* 612 S.W.2d 493, 497 (Tenn.Crim.App.1980), *perm. to appeal denied,* (Tenn.1981). Moreover, this court has held that where the indictment fails to state the mental element of the charged offense, the trial court is divested of the jurisdiction necessary to proceed with the criminal prosecution. *See State v. Marshall,* 870 S.W.2d 532, 537 (Tenn.Crim.App.), *perm. to appeal denied,* (Tenn.1993).

The State concedes this point but argues that the element of "knowing" is implied in the language of the indictment. Specifically, the State argues that inclusion of the term "unlawfully," necessarily implies that the possession was "knowing" since the possession could not have been "unlawful" if it were not "knowing."

The State cites *Marshall* as support for its argument. In *Marshall,* the indictment alleged that the defendant "did possess, with intent to sell, a controlled substance." 870 S.W.2d at 536. We held that by alleging that the defendant possessed cocaine which he *intended* to sell, the indictment "necessarily implied that it was a knowing possession." *Id.* at 538. The indictment in the present case, however, is substantially different than that in *Marshall.* The indictment in *Marshall* contained language of mental culpability ("intent"). (FN2) Here there is none. Moreover, one could rationally infer from the *Marshall* indictment that if a person intended to sell cocaine, such person knowingly possessed cocaine. No such inference can be made from the language in the indictment before us. "Unlawfully" does not, in the ordinary use of the term, connote mental culpability. One cannot logically infer that an accused acting "unlawfully" necessarily acts "knowingly." A culpable mental state is required for the offense charged. *See* Tenn.Code Ann. § 39-11-301(b) (1991). We therefore conclude that as a result of the omission of the requisite element of mental culpability the trial court lacked jurisdiction to

convict the appellant of simple possession of marijuana.

III. *Admission of the Seized Evidence*

**3 The appellant also contends that the trial court erred in admitting the evidence seized as a result of the search of the appellant's person. Specifically, the appellant argues (1) that the search was an invalid "stop and frisk" search, (2) that the police should have obtained a warrant to open the film canister, and (3) that the police did not have probable cause to search or arrest the appellant. The State contends that the search was valid as a search incident to lawful arrest.

Ordinarily, the search of a person and the seizure of any items on the person requires a warrant. *United States v. Place,* 462 U.S. 696, 701, 103 S.Ct. 2637, 2641 (1983). However, the Supreme Court of the United States has continually carved out exceptions to this rule based on the level of intrusiveness involved in the search, the expectation of privacy of the individual, and the circumstances surrounding the search. The Tennessee Supreme Court has largely followed the U.S. Supreme Court's lead in this area. For example, a warrantless search is authorized when the seized items are in the "plain view" from a lawful vantage point of the searching officer. *See Harris v. United States,* 390 U.S. 234, 88 S.Ct. 992 (1968); *Armour v. Totty,* 486 S.W.2d 537 (Tenn.1972). Also, a warrantless search will be upheld where there are "exigent circumstances" that justify the search before a warrant can be obtained. *See McDonald v. United States,* 335 U.S. 451, 69 S.Ct. 191 (1948); *Rippy v. State,* 550 S.W.2d 636 (Tenn.1977).

If the warrantless search conducted in this case is to be upheld, its justification must rest on one of the following three exceptions to the warrant requirement: (1) the doctrine of "search incident to arrest," established in *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034 (1969); (2) the "automobile exception" to the warrant requirement, established in *Carrol v. United States,* 267 U.S. 132, 45 S.Ct. 280 (1925); or (3) a limited "stop and frisk" search pursuant to *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868 (1968). *See also Van Pelt v. State,* 246 S.W.2d 87 (Tenn.1952)(search incident to arrest); *State v. Shrum,* 643 S.W.2d 891 (Tenn.1982)(automobile exception); *Hughes v. State,* 588 S.W.2d 296 (Tenn.1979) (*Terry* search).

Since the search was conducted without a warrant, it is presumed unreasonable. *See State v. Hughes,* 544 S.W.2d 99, 101 (Tenn.1976). The State has the burden to show that the search was conducted within a recognized exception to the warrant requirement. *State v. McClanahan,* 806 S.W.2d 219, 220 (Tenn.Crim.App.1991).

A. *Search Incident to Arrest and the Automobile Exception*

1. *The requirement of probable cause*

Under the doctrine of search incident to arrest, "a lawful custodial arrest creates a situation which justifies the contemporaneous search without a warrant of the person arrested and of the immediately surrounding area." *New York v. Belton,* 453 U.S. 454, 457, 101 S.Ct. 2860, 2862 (1981). In order to justify a search as incident to arrest, the searching officer(s) must have probable cause to arrest the appellant. *See Belton,* 453 U.S. at 457, 101 S.Ct. at 2862. Probable cause to arrest exists if the officers had "facts and circumstances within their knowledge and of which they had reasonably trustworthy information [that] were sufficient to warrant a prudent man in believing that the [defendant] had committed an offense." *State v. Melson,* 638 S.W.2d 342, 350-351 (Tenn.1982) (quoting *Beck v. Ohio,* 379 U.S. 89, 85 S.Ct. 223 (1964)).

**4 Under the automobile exception to the warrant requirement, a search of an automobile without a warrant is justified where the police officers have probable cause to believe that the automobile contains contraband. *See United States v. Ross,* 456 U.S. 798, 824, 102 S.Ct. 2157, 2172 (1982).

Thus, it is clear that under either the doctrine of search incident to arrest or the automobile exception to the warrant requirement, the police must have probable cause to believe that the appellant had illegal narcotics on his person, that the automobile contained illegal narcotics, or that the appellant was involved in selling illegal narcotics. Since the search was performed without a warrant, the State has the burden of establishing that the police had probable cause. *See State v. Watkins,* 827 S.W.2d 293, 295 (Tenn.1992).

2. *The Aguillar-Spinelli test*

In this case, the information that led to both the search and arrest was supplied by a confidential informant. Thus, in order to prove probable cause, the State must establish (1) that the informant had a basis for his information that a person was involved in criminal conduct and (2) that the informant is credible. *See State v. Jacumin,* 778 S.W.2d 430 (Tenn.1989). This two-prong test was first developed in *Aguillar v. Texas,* 378 U.S. 104, 84 S.Ct. 1509 (1964) and *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584 (1969), and is commonly known as the *Aguillar-Spinelli* test. The *AguillarSpinelli* test was developed in the context of searches pursuant to warrants, and most of its application has been in that context. In such cases, the affidavit used to obtain the search warrant from the issuing magistrate is examined to determine whether its contents support a finding of probable cause. When the *Aguillar-Spinelli* test is applied to a warrantless search, however, there is no affidavit to examine. Instead, the trial court and the appellate courts must examine the testimony of law enforcement officers concerning the information supplied by the informant. Thus, we must review the testimony of Officer Abernathy to determine whether the information supplied to him by the informant established probable cause. For the reasons discussed below, we conclude that the police did not have probable cause to either search or arrest the appellant.

Officer Abernathy testified that the informant had supplied him with reliable information in the past that had led to the seizure of cocaine. This testimony establishes the second, or "credibility prong" of *Aguillar-Spinelli.* However, the appellant does not challenge the credibility of the informant. The appellant avers that the "basis of knowledge" prong was not established by the State. Specifically, the appellant contends that the information supplied by the confidential informant failed to articulate how the informant knew that the appellant and his colleagues were selling cocaine. In support of this argument, the appellant points out that in his testimony concerning the information given to him by the informant, Officer Abernathy never described the manner in which the information was gathered. In the absence of evidence of personal observation, argues the appellant, there is no basis of knowledge for the informant's allegation that the appellant was selling cocaine. On the other hand, the State argues that it is "self-evident from Officer Abernathy's testimony that the informant had personal knowledge of the suspect's activities." Existing law does not support the State's position.

**5 In *Spinelli,* the Supreme Court held that "[i]n the absence of a statement detailing the manner in which the information is gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." 89 S.Ct. at 589. Tennessee courts have generally followed this approach. The relevant Tennessee case law supports the conclusion that the information supplied to Officer Abernathy in this case did not describe the *criminal activity* in sufficient detail to overcome the lack of personal observation. Before us is only the informant's bald assertion that "they [are] selling crack cocaine on the street" and "somehow [are] carrying the crack."

In *State v. Smith,* 477 S.W.2d 6 (Tenn.1972), the police obtained a warrant with an affidavit that stated: "affiant has received information from a reliable source who has given reliable information in the past two days that marijuana and legend drugs have been seen, used and stored at the below described premises." *Id.* at 8. The supreme court concluded that the affidavit did not state how the informant gathered his information and, citing *Aguillar,* struck down the warrant for lack of probable cause. *Id.* at 8-9.

In *State v. Vela,* 645 S.W.2d 765 (Tenn.Crim.App.1982), *perm. to appeal denied,* (Tenn.1983), another case involving a search warrant, the police received information from a confidential informant that the defendant and others "were selling marijuana" at a certain address. *Id.* at 766. According to the affidavit used to procure the warrant, the informant provided the names of the suspects, their physical description, their car identification and the fact that they dealt at the Farmer's Market. *Id.* The affidavit did not, however, state how the informant gathered his information. *Id.* at 766-767. The trial court denied the defendant's motion to suppress, and he appealed. On appeal, we held:

> the affidavit does not relate how the informant concluded that the defendants were selling marijuana. The affidavit does not relate how the informant received his information, and there is no allegation that the informant personally observed the defendants

selling or possessing marijuana....The names, address, physical description, car identification ... has no relation as to whether they were dealing in marijuana.

*Id.* (FN3)

In *State v. Coleman,* 791 S.W.2d 504 (Tenn.Crim.App.1989), *perm. to appeal denied,* (Tenn.1990), a confidential informant told a police officer the following information:

between 2:00 and 2:30 p.m. on August 10, a white female, between 25 and 35 years of age and whose first name was Carla, would be en route to Robertson County from Davidson County on Highway 431 South.... She would be driving an older model black Monte Carlo, would have in her possession several pounds of marijuana, and would ultimately drive to a location on Washington Road.

**6 791 S.W.2d at 504. The informant did not reveal to the officer how he knew about the impending transaction. *Id.* Based on this information, the police stopped and searched the defendant's automobile without a warrant. *Id.* at 504-505. The trial court ruled that the search was invalid, and this court agreed on appeal. We held that the informant's tip did not establish "reasonable suspicion" to stop the appellant's automobile, in part because the tip did not, "possess, even by way of inference, the basis for the informant's knowledge." *Id.* at 507. *see also State* v. *Jacumin,* 778 S.W.2d 430 (Tenn.1989)(affidavit supporting warrant failed both prongs of *Aguillar-Spinelli* ); *Earls v. State,* 496 S.W.2d 464 (Tenn.1973)(warrant held invalid for affidavit's failure to describe how informant received information, search upheld based on consent); *Matlock v. State,* 155 Tenn. 624, 299 S.W. 796 (1927)(warrant held invalid because affidavit failed to state that informant had personally observed contraband); *but see Holder v. State,* 490 S.W.2d 170 (Tenn.Crim.App.1972)(search upheld where informant failed to describe manner in which he had gathered information).

These cases make it clear that unless the informant describes the criminal activity of the suspects with great detail, the informant must describe the manner in which the informant gathered the information. Otherwise, probable cause cannot be established under the *Aguillar-Spinelli* test. The facts of the case before us are somewhat similar to those of *Vela* and *Coleman.* Here, as in both of those cases, the informant described the suspects and their car with particularity. We specifically held in *Vela* that such descriptions have no relation as to whether the suspects were involved in criminal activity and cannot establish the basis of knowledge prong of *AguillarSpinelli. Vela,* at 766-777. In this case, in addition to describing the suspects and the car, the informant stated that one of the suspects was carrying a gun and that the other was carrying the cocaine. Although this additional information may have furnished a more detailed description of the suspect's criminal activity than existed in *Vela* and *Coleman,* it did not detail their activities to the degree that would have affirmatively revealed to a police officer receiving the information that the officer is "relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." Basically, the information given by the informant in this case was the type of "mere affirmation or belief" held by the informant that was expressly disapproved of in the cases discussed above. The information did not satisfy the basis of knowledge prong of the *AguillarSpinelli* test and therefore did not establish probable cause to either search or arrest the appellant. Thus it is clear that the search was not valid as a search incident to arrest or an automobile search. (FN4)

*B. Terry "Stop and Frisk"*

**7 We now turn to the inquiry of whether the search and seizure can be upheld as a valid "stop and frisk" search under *Terry.* In *Terry,* the Supreme Court held that where a police officer has reasonable suspicion to conclude that criminal activity may be afoot and that the persons with whom the officer is dealing may be armed and dangerous, the officer is "entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." 392 U.S. at 30, 88 S.Ct. at 1884-85. The holding in *Terry* has been explained and expanded in several subsequent Supreme Court decisions. We review these cases and the relevant Tennessee cases to determine (a) whether the police officers had reasonable suspicion to stop the automobile in which the appellant was a passenger and to search the appellant and (b) if so, whether the seizure of the film container from the appellant's

underwear and the opening of the container exceeded the permissible scope of a *Terry* search.

1. *Reasonable Suspicion*

In *State v. Watkins*, 827 S.W.2d 293 (Tenn.1992), the Supreme Court of Tennessee held that "a police officer may make an investigatory stop of a motor vehicle when the officer has a reasonable suspicion, supported by specific and articulable facts, that a criminal offense has been or is about to be committed." 827 S.W.2d at 294. When a stop is based solely on an informant's tip, the *Aguillar-Spinelli* test is helpful in determining whether the police had reasonable suspicion. *State v. Pulley*, 863 S.W.2d 29, 31 (Tenn.1993); *State v. Coleman*, 791 S.W.2d 504, 505 (Tenn.Crim.App.1989), *perm. to appeal denied*, (Tenn.1990). However, when applying the *Aguillar-Spinelli* test in a reasonable suspicion analysis, we must keep in mind that:

> reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.

*Pulley*, 863 S.W.2d at 32(quoting *Alabama v. White*, 496 U.S. 325, 330 (1989)).

We conclude that the information supplied by the confidential informant in this case, although insufficient to establish probable cause, was sufficient to establish reasonable suspicion that the appellant was involved in criminal activity. Therefore, the officers did not violate the appellant's constitutional rights by stopping the car in which he was a passenger. We conclude further that the officers had reasonable suspicion to believe that the appellant was armed and dangerous. *But see Coleman*, 791 S.W.2d at 507. Therefore, a *Terry* frisk of the appellant was justified.

2. *Scope of a Terry Search*

****8** In order for the fruits of a search based upon reasonable suspicion to be admissible, the search must have been sufficiently limited in scope. In *Terry*, the Supreme Court explicitly stated that a stop and frisk based on reasonable suspicion "must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." 392 U.S. 1, 88 S.Ct. 1868. However, this does not mean that only weapons may be seized. In *Minnesota v. Dickerson*, --- U.S. ----, 113 S.Ct. 2130 (1993), the Supreme Court held that where an officer who is conducting a valid *Terry* frisk for weapons feels something that the officer reasonably recognizes, without further searching, as contraband, the officer may seize the contraband without obtaining a warrant. *Id.* at 2136-2138. (FN5) The Court opined in *Dickerson* that if an officer "lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons." *Id.* at 2137. Therefore, the question before us is whether upon feeling the film canister, the searching officer in this case immediately recognized that it was contraband. If so, then the officer was justified in seizing the canister. In *Dickerson*, the court suggested that an immediate recognition that the object felt is contraband amounts to giving the officer probable cause to seize the object. 113 S.Ct. at 2137, n. 4. Thus in determining whether the officer in this case "immediately recognized" the film canister as "contraband," we must employ a probable cause analysis. In other words, our inquiry must focus on whether the tactile discovery of the film canister gave the officer, at that moment and without further searching, probable cause to believe that it was contraband.

Probable cause has been defined as "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the evidence is in the place to be searched." *State v. Meeks*, 876 S.W.2d 121 (Tenn.Crim.App.1993). In this case, the officers had received information from an informant that the appellant was involved in selling cocaine and was carrying cocaine on his person. While one of the officers was conducting a lawful frisk of the appellant, he encountered a hard round object in the crotch area of the suspect. The searching officer testified at the suppression hearing that he knew immediately upon feeling the object that it was a film canister, and that based on his experience, he had a strong belief that it contained drugs. Although possession by the appellant of the film canister was suspicious in nature and may

have provided a hunch as to its intended use, we conclude under the facts presented that the officer did not have probable cause to believe that the film canister he felt was contraband. The majority of courts interpreting *Dickerson* have upheld the search only where the officer could immediately feel and recognize the contraband itself. *Compare United States* v. *Gibson,* 19 F.3d 1449 (D.C.Cir.1994)(seizure of flat, hard object containing cocaine in pants pocket exceeded scope of *Terry* ) and *United States v. Mitchell,* 832 F.Supp. 1073 (N.D.Miss.1993)(seizure of crack cocaine found in plastic bag stuffed in athletic sock and carried in leather jacket pocket exceeded scope of *Terry* ) with *United States v. Hughes,* 15 F.3d 798 (8th Cir.1994)(seizure upheld where officer felt "small lumps" believed to be crack cocaine) and *United States v. Craft,* 30 F.3d 798 (8th Cir.1994)(seizure upheld where officer felt "bulges" of heroin taped around ankles). Obviously, removal of the opaque film canister from the appellant's person did not permit an immediate recognition by the officer of contraband without a further searching of the contents of the container. Thus, the seizure of the canister from the appellant's person exceeded the scope of a valid *Terry* search.

**9 We conclude that the seizure from the appellant's person of the film canister containing cocaine violated his rights under the Fourth Amendment to the United States Constitution and Article I, § 7 of the Tennessee Constitution.

We have previously concluded that the indictment under Court Two charging simple possession of marijuana was invalid. We do not address the sentencing issue raised by the appellant as it is now moot.

Accordingly, the judgments of conviction entered under both Counts One and Two of the indictment are reversed and the charges against the appellant are dismissed.

HAYES and WADE, JJ., concur.

Separate Concurring Opinion

Although I agree with the majority in results, I must respectively disagree with the reasoning applied in Issue III(B)(2) regarding the scope of the *Terry* stop. The facts in this case indicate that while conducting the patdown search of the defendant the officer felt a "hard round object" in the defendant's crotch area which turned out to be a film canister. By his testimony the officer indicated that based upon his experience, he had a strong belief that the canister contained drugs. The majority concludes that the film canister failed to meet the "immediately apparent" requirement as established by the United States Supreme Court.

In *Texas v. Brown,* 460 U.S. 730, 741-42 (1983) the Supreme Court stated that an object is considered to be "immediately apparent" when the officer develops a reasonable belief as to the object's identity. The officer has then established probable cause and the seizure of the item is justified if the officer can reasonably conclude that the item may be contraband or other evidence of a crime. The *Brown* Court rejected the notion that the officer be "possessed of near certainty" of the object's identity. The Supreme Court acknowledged in *Brown* that probable cause "requires that the facts available to the officer would warrant a man of reasonable caution in the belief ... that certain items may be contraband." *Brown,* 460 U.S. at 741-42 (citations omitted). In *Brown* the officer, during a routine driver's license checkpoint, observed among other things in the defendant's vehicle an opaque, green party balloon knotted at the tip and knew from his experience that such balloons were often used to package narcotics. The Court determined that the officer possessed sufficient probable cause to seize the balloons finding that it was irrelevant that the officer could not see through the opaque balloon. The presence of the balloon itself under the circumstances, "particularly to the trained eye of the officer," strongly indicated that drugs were likely to be found inside. *Brown,* 460 U.S. at 742-43.

Although *Brown* dealt with the "plain view" doctrine the same analysis is useful when considering the "plain feel" doctrine. In *Minnesota v. Dickerson,* 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993), the Supreme Court established the requirement in the "plain feel" doctrine, as in "plain view," that the contraband be "immediately apparent"; however, the Court established no bright line rule. An objective reading of *Dickerson* indicates that the Supreme Court intended for the trial courts to apply a "reasonableness" standard.

**10. Applying the reasoning of *Brown* and *Dickerson* to the present case, I would hold that based

upon the information known to the officer that the defendant was carrying drugs, that drugs are often carried in film canisters, and the fact that the canister was located in the defendant's underwear where film is not generally carried, it was reasonable for him to conclude that the film canister contained narcotics. Based upon this information, I would find that it was immediately apparent to the officer that the defendant possessed contraband and therefore the officer had probable cause to seize the canister.

Except as noted herein, I agree with the majority in all and in the conclusion that once the opaque film canister was seized the officer should have obtained a search warrant before opening the container. However, for the reasons cited above, I would find that the seizure of the film canister during the *Terry* stop was proper.

FN1. The record does not indicate whether the same informant gave Abernathy the information on both nights.

FN2. In *Marshall,* we noted that "intentional" includes, by statutory definition, "knowing." 870 S.W.2d at 538. *See* Tenn.Code Ann. § 39-11-301(a)(2).

FN3. Although we held in *Vela* that the information supplied by the informant did not establish probable cause, we upheld the search based upon the independent observations of the police during a two-week surveillance of the defendant. 645 S.W.2d at 767-768.

FN4. It could be argued that the police had probable cause to arrest the appellant *after* they seized the cocaine. However, as the Supreme Court has stated, "[i]t is axiomatic that an incident search may not precede an arrest and serve as part of its justification." *Sibron v. New York,* 392 U.S. 40, 63, 88 S.Ct. 1889, 1902 (1968).

FN5. In *Dickerson,* a Minneapolis police officer had reasonable suspicion to believe that a suspect was armed and dangerous. Upon frisking the suspect for weapons, the officer encountered a small lump in the pocket of the suspects jacket. 113 S.Ct. at 2133. The officer "examined [the lump] with [his] fingers and it slid and it felt to be a lump of crack cocaine in cellophane." *Id.* The officer then seized a small plastic bag containing cocaine from the suspect. *Id.* The Supreme Court held that although the officer was lawfully in a position to feel the lump in the suspect's pocket, the further searching performed to determine that it was contraband exceeded the scope of a permissible *Terry* search. *Id.* at 2139.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A TRUE AND EXACT COPY OF THE FORGOING HAS BEEN SENT VIA UNTIED STATES TO:

HAMILTON COUNTY OFFICE OF THE CRIMINAL COURT CLERK
GWEN TIDWELL: CLERK
ROOM 102 COURTS BUILDING
600 MARKET STREET
CHATTANOOGA, TENNESSEE 37402
PHONE: (423) 209-7500

BY PLACING A COPY IN THE UNITED STATES MAIL, FIRST-CLASS, POSTAGE PREPAID.

ON THIS, THE 24th DAY OF October 2007

Edward Jerome Harbison

EDWARD JEROME HARBISON, #108926
PRO SE, PETITIONER
RMSI, UNIT TWO, D-POD, CELL 109
RIVERBEND MAXIMUM SECURITY INSTITUTION
7475 COCKRILL BEND BOULEVARD
NASHVILLE, TENNESSEE 37209-1048

PETITIONER'S VERIFICATION UNDER OATH SUBJECT TO

PENALTY FOR PERJURY

I swear (or affirm) under penalty of perjury that the forgoing is true and correct.

Executed on October 24, 2007
(Date)

Edward Jerome Harbison