



## I. Proposed Findings of Fact

On the afternoon of March 17, 1990 Sergeant Lloyd Burcham of the Maine State Police was on routine patrol on the Maine Turnpike. T. 5-6. As he was passing a northbound pickup truck in the Saco area just before 3:00 p.m., he observed a crack which extended fully across the truck's windshield. T. 6; Gov't Exhs. 1-2. Being aware that operation of a motor vehicle with a cracked windshield is a violation of Maine law, he proceeded to stop the truck by pulling in behind it, activating his blue lights and following it as it pulled onto the breakdown lane. T. 7-8. As the vehicle was pulling over, he noticed that the passenger, who later identified himself as defendant Nason, took his left arm from the position it occupied on the back of the seat and moved it between himself and the driver, later identified as defendant Arey. T. 8, 12-13. Nason's arm movement appeared to Sergeant Burcham to indicate that he was pushing something down into the seat between the two vehicle occupants. T. 9. Burcham became concerned that Nason was trying to hide something from his view. *Id.* When the sergeant exited his vehicle and began walking toward the driver's side of the truck, he again saw Nason reach down toward the front of his seat and then come back up. *Id.* He also observed that there were several items in the open bed of the truck, among them, tucked between two bags, two beer cans directly under the open sliding-glass window at the rear of the cab. T. 9-10, Gov't Exh. 1. He was unable to tell at the time whether the beer cans were open or closed. T. 10. Sergeant Burcham became suspicious that the defendants might be consuming intoxicating beverages. T. 11.

When Burcham arrived at the driver's side and asked Arey for his license and registration, he detected an odor of intoxicating beverage emanating from the truck. *Id.* He was also able to see a beer can on the floor of the cab next to Nason's feet. T. 11-12. Again, at that point he was unable to

observe whether it was open or closed. T. 12. Suspecting that the defendants had been consuming beer in the truck, Sergeant Burcham asked them if they had been drinking and both replied that they had not. *Id.* At this point, concerned for his own safety, Burcham had Arey exit the truck and directed him to stand between the truck and the sergeant's vehicle so that Burcham could watch Arey while he approached the passenger side in order to continue his investigation to determine if the defendants had actively been drinking. T. 14-15. When Burcham approached the passenger side, Nason opened the door allowing Burcham to look directly into the cab where he again saw the beer can at Nason's feet. *Id.* He reached in, grabbed the beer can, which he found to be open and one-quarter full, and dumped its contents, which he determined in fact to be beer, onto the ground. T. 15. He then had Nason exit the truck. *Id.* As he did so, Burcham observed a brown jacket on the passenger seat in a position between where the two defendants had been sitting. T. 15-16. It appeared to have been pushed between the seats. T. 16. He was also able to observe a portion of a small glass vial protruding from underneath the jacket. *Id.* He suspected at the time that the vial was a marijuana pipe. *Id.* He also observed a propane gas cylinder lying next to the beer can on the floor. T. 17. This added to his suspicion because he believed that, as a heat source, the cylinder could have been used to light the pipe. *Id.* Sergeant Burcham next asked to whom the jacket belonged. *Id.* Nason said, ``It's mine." *Id.* He then asked Nason to reach in and hand the jacket out to him so he could inspect it further. *Id.* Nason reached in, but no sooner had he started to pick up the jacket when he put it back down onto the seat. *Id.* In the short time the jacket was raised from the seat, Sergeant Burcham observed the glass tube more plainly. *Id.* He estimated its length at four and one-half inches and still believed it to be a marijuana pipe. T. 17-18.

When Nason put the jacket back down onto the seat, Sergeant Burcham became very concerned for his safety. T. 18. It was very obvious to him that Nason did not want to pick up the

jacket and Burcham was concerned as to what might be under it. *Id.* Arey, who by now had moved from his original position between the two vehicles to the right rear of the truck's bumper, appeared extremely nervous. *Id.* He variously rubbed his hands together, took off his hat, rubbed his head and put his hat back on. *Id.* Nason, too, was nervous, especially after he initially picked up the jacket. T. 18-19. The defendants' nervousness, coupled with his own earlier observations, made Sergeant Burcham more nervous. T. 19, 59-61. Burcham then ordered Nason to remove the jacket from the truck and hand it to him very slowly.<sup>2</sup> As Nason handed the jacket to Burcham, Burcham grabbed it by a sleeve and, in doing so, felt an object inside the sleeve.<sup>3</sup> He twice asked Nason what was in the jacket. *Id.* Nason replied, ``You don't want to know." *Id.* Burcham then opened up the jacket, reached in the sleeve and pulled out a folded-over paper bag. *Id.* In order to find out what the bag contained, he opened it and looked in, whereupon he saw a clear plastic bag containing a white powder substance which he suspected was cocaine. T. 20-21. To this point the stop had taken no more than five minutes. T. 68.

Sergeant Burcham next had Nason step to the front of the truck while telling Arey to remain at the rear. T. 21. He then proceeded to pat Nason down for weapons and handcuffed him. *Id.* Nason was then in custody. *Id.* Burcham then patted Arey down and handcuffed him. T. 22. He, too, was in custody. *Id.* In patting down Nason, Sergeant Burcham found in his front shirt pocket a clear plastic vial which contained what appeared to be a ball of crack cocaine. *Id.* Other items found on his person were a note and a knife. *Id.* A similar vial containing a powdery residue and a knife were

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<sup>2</sup> Sergeant Burcham testified that he asked Nason to reach in and get the jacket, rather than do so himself, so that he could observe Nason at all times and keep his hands free in case there was a weapon there. T. 49. He did not want Nason in a position to overpower him. *Id.*

<sup>3</sup> Burcham testified that he was not able at that point to tell what was in the sleeve, but suspected that, among other things, it could be a weapon. T. 51, 62.

found on Arey. *Id.* Burcham then placed the defendants in his vehicle and called for assistance. T. 23. When another trooper arrived, both officers initiated an inventory search of the truck during the course of which they discovered and seized other contraband. T. 23-27. Other items belonging to Nason were seized as a result of a further search of his personal effects at the York County Jail. T. 28-29.

## II. Legal Discussion

The defendants argue that the evidence recovered from the searches of the jacket, the truck, their persons and Nason's personal effects should be suppressed for four reasons: (1) Sergeant Burcham did not have a reasonable suspicion to prolong the stop beyond his investigation of the cracked windshield; (2) the search of the beer can was not based on probable cause; (3) the search of the jacket was unlawful because Sergeant Burcham did not have a reasonable belief that he was in danger; and (4) the arrest of the defendants and subsequent search of the truck, the defendants and Nason's personal effects were based on the illegal search of the jacket and were therefore invalid.

In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court articulated an exception to the traditional rule disallowing detention without probable cause. This exception requires the court to

“balanc[e] the need to search [or seize] against the invasion which the search [or seizure] entails.” And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.

*Id.* at 21 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 536-37(1967)). This exception is particularly cogent when a police officer is faced with a potentially dangerous situation.

When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

*Id.* at 24. A police officer may order a person out of a car and conduct a protective search of that person if he has a reasonable belief that he is carrying weapons and is dangerous. *Pennsylvania v. Mimms*, 434 U.S. 106, 109-12 (1977). In addition, a protective search for weapons is not limited to a detainee's person. In this respect, the Court has acknowledged the inordinate risk which faces a law enforcement officer when he approaches a person in an automobile. *Id.* Thus, the principles first articulated in *Terry* compel [the] conclusion that the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based upon "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.

*Michigan v. Long*, 463 U.S. 1032, 1049 (1983) (quoting *Terry v. Ohio*, 392 U.S. at 21). Furthermore, this exception "has been widened in the last decade to encompass other circumstances where officers may make brief investigative stops or seizures of individuals upon reasonable suspicion that they may have committed, are committing, or are about to commit a crime." *United States v. Quinn*, 815 F.2d 153, 156 (1st Cir. 1987). The court reviewing such police action must inquire "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *United States v. Sharpe*, 470 U.S. 675, 682 (1985) (quoting *Terry v. Ohio*, 392 U.S. at 20); *United States v. Trullo*, 809 F.2d 108, 111 (1st Cir. 1987).

The defendants acknowledge that Sergeant Burcham's initial stop and investigation were warranted by his observation that they were driving a truck which did not comply with Maine motor vehicle laws. See Written Closing Argument of Leon Earl Nason at 2; Defendant Arey's

Memorandum in Support of Motion to Suppress II at 1. They argue, however, that he lacked probable cause to search the interior of the truck for alcoholic beverages and that his search for weapons was not reasonable under the circumstances. I conclude that the facts and circumstances known to Sergeant Burcham at the time of the search of the passenger compartment of the truck were sufficient to warrant his belief that the defendants were violating Maine's public drinking law and that defendant Arey was violating Maine's drinking while operating a motor vehicle law, and that Burcham had a reasonable belief, based on articulable facts, that the defendants may have been armed and dangerous. He therefore had sufficient cause to perform a protective search of the passenger compartment of the truck, including the brown jacket pushed into the seat.

Maine's public drinking statute, 17 M.R.S.A. ' 2003-A, prohibits the consumption of liquor in any public place. It provides that any person drinking liquor in a public place will first be warned that such activity is a violation of the law. Any person who consumes alcohol in public after receiving this warning is guilty of a Class E crime. 17 M.R.S.A. ' 2003-A(2). Subsection (3) states that the possession of an open container of liquor in a public place is prima facie evidence of a violation of the statute. 17 M.R.S.A. ' 2003-A(3). The drinking while operating a motor vehicle statute makes drinking liquor "while operating a motor vehicle on any public way" a civil violation. 29 M.R.S.A. ' 1312-F.

When he initially observed the defendants in what is admittedly both a public place and a public way, Officer Burcham saw Nason engage in movements which suggested that he was attempting to hide something. He also saw two beer cans in the bed of the truck beneath the open sliding-glass rear window. Upon approaching the driver's side of the vehicle and asking Arey for his identification, Burcham detected an odor of intoxicating beverage emanating from the truck and he was able to see a beer can on the floor of the cab next to Nason's foot. At this point Sergeant Burcham became

concerned for his own safety and had Arey get out of the truck and stand behind it so he could watch him while he continued his investigation. Further investigation revealed that the defendants, contrary to their initial statement that they had not been drinking, had an open container of alcohol in the truck and possibly illegal drug paraphernalia. Burcham became further concerned about his safety after asking Nason to get out of the truck and hand him the brown jacket stuffed into the seat. Nason's initial refusal to hand him the jacket and both defendants' apparent agitation and extreme nervousness further heightened Burcham's concern that the defendants might be carrying weapons.<sup>4</sup> Burcham's order to Nason that he hand him the jacket very slowly and the subsequent discovery and examination of the object hidden in the sleeve were consistent with a reasonable officer's perception that these defendants may have posed a risk to his safety and that the jacket may have contained a weapon.

Viewing the totality of the circumstances, I conclude that the government has sufficiently demonstrated that Sergeant Burcham possessed "a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant[ed] the officer in believing that the suspect [was] dangerous and the suspect may [have] gain[ed] immediate control of weapons." *Michigan v. Long*, 463 U.S. at 1049. Armed with this reasonable suspicion, Officer Burcham was entitled to conduct a *Terry* search of the cab of the truck and everything in it where a weapon could be hidden, including the jacket on the seat. *Id.* Because I conclude that Burcham's *Terry* search of the jacket was proper, I also conclude that his discovery of

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<sup>4</sup> The defendants argue that Sergeant Burcham could not have had a reasonable suspicion that they were carrying weapons because he did not see any such weapons. An officer is not required to see weapons in order to justify an investigative search for them. *See, e.g., Terry v. Ohio*, 392 U.S. at 29-30.

the cocaine was lawful: "[i]f, while conducting a legitimate *Terry* search of the interior of the automobile, the officer should, as here, discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances." *Id.* at 1050 (citations omitted).

Finally, because I conclude that the initial search of the jacket and the seizure of evidence therefrom were lawful, I also conclude that Sergeant Burcham had probable cause to arrest the defendants and that the warrantless searches of the truck, which also yielded other contraband, and of defendants' person and Nason's personal effects, which yielded powder, crack cocaine, currency and other items, were properly conducted. *New York v. Belton*, 453 U.S. 454, 460 (1981); *United States v. Robinson*, 414 U.S. 218, 235 (1973).

For the foregoing reasons, I recommend that the defendants' motions to suppress be **DENIED.**

#### **NOTICE**

***A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.***

***Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.***

***Dated at Portland, Maine this 10th day of August, 1990.***

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***David M. Cohen***  
***United States Magistrate***