NOT DESIGNATED FOR PUBLICATION

No. 96,702

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

DANIEL L. FITZPATRICK,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; JAMES FRANKLIN DAVIS, judge.

Opinion filed January 25, 2008. Reversed and remanded.

Randall L. Hodgkinson, of Kansas Appellate Defender Office, for appellant.

Steven J. Obermeier, assistant district attorney, *Phill Kline*, district attorney, and *Paul J. Morrison*, attorney general, for appellee.

Before GREENE, P.J., McANANY, J. and LARSON, S.J.

Per Curiam: Daniel L. Fitzpatrick appeals his conviction for possession of marijuana with intent to sell, arguing the district court erred in denying his motion to suppress. We agree and reverse.

Factual and Procedural Background

A Shawnee police officer was on drug and alcohol interdiction following a rock concert when he observed a vehicle drift onto the shoulder of the roadway on two occasions within 3 blocks. The officer stopped the vehicle based on failure to maintain a single lane of traffic in violation of that municipal ordinance, but he also stated he had concern of "possible impairment of the driver." The officer approached the driver's side of the vehicle, but when he noticed a passenger (*not* Fitzpatrick) holding an open container of alcohol he ordered all three occupants out of the vehicle "so [he] could perform a search for more containers in the vehicle."

Prior to the search of the vehicle, the officer made a "funny comment" to Fitzpatrick, one of the passengers, before conducting a consensual pat-down search of his person. This search yielded no weaponry or contraband, so the officer proceeded to search the vehicle for more containers. After this search had been completed, another officer present at the scene noticed that Fitzpatrick had a "rather large bulge" in the front

of his pants; the first officer then reapproached Fitzpatrick and asked for consent to search his pockets. When Fitzpatrick agreed, the officer entered his right front pocket and his "hand went over" to the bulge, where he was able "to feel a plastic bag" that "crinkled." Believing the bag to contain marijuana, the officer gave Fitzpatrick a choice to hand over the bag or it would be recovered forcibly. Fitzpatrick chose to remove the plastic bag and handed it to the officer. Contents of the bag tested positive for marijuana.

Fitzpatrick was charged with possession of marijuana with intent to sell. Prior to trial, he moved the district court to suppress the evidence of the bag and its contents. But the district court denied his motion concluding that after consent was obtained to search the pocket, "that opened the door as to feeling the bag." Fitzpatrick was convicted as charged and sentenced to 46 months' imprisonment.

Standard of Review

Fitzpatrick's appeal requires that we evaluate the legality of the officer's conduct at various points during the encounter with the vehicle and its occupants. In this type of review, we review the factual underpinnings of the decision by a substantial competent evidence standard and the ultimate legal conclusion by a de novo standard with

independent judgment. An appellate court does not reweigh evidence, pass on the credibility of witnesses, or resolve conflicts in the evidence. *State v. Ackward*, 281 Kan. 2, 8, 128 P.3d 382 (2006).

Did the Officer Have Reasonable Suspicion to Stop the Vehicle in which Fitzpatrick was a Passenger?

Fitzpatrick first argues there was no basis for the officer to stop the vehicle because the municipal ordinance relied upon by the officer "does not bar a driver from driving on the shoulder." Fitzpatrick also notes the citation for this violation was ultimately dismissed due to "no charge stated" on the ticket. At the first hearing on the suppression motion, the district court stated, "[T]he cited section of the Shawnee code was proper basis to effect the traffic stop in this case on the independent ground as well the driving twice off onto the shoulder is possible cue of impairment, an officer can make a stop here." At the second hearing on the motion, the court stated that "the officer made the stop because the vehicle had twice crossed to the shoulder."

The municipal ordinance in question is based upon K.S.A. 8-1522, which states:

"Whenever any roadway has been divided into two (2) or more

clearly marked lanes for traffic, the following rules in addition to all others consistent herewith, shall apply.

"(a) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."

Our court has had occasion to address reasonable suspicion based on failure to maintain a single lane in two recent opinions. In *State v. Ross*, 37 Kan. App. 2d 126, 127, 149 P.3d 876, *rev. denied* 284 Kan. __ (2007), a panel of our court held that an officer's observation of a vehicle crossing the fog line on a single occasion did not, without more, provide reasonable suspicion that K.S.A. 8-1522 (identical to the ordinance at issue herein) had been violated. Rather, "the totality of the circumstances must make it appear to the officer that not only did the defendant's vehicle move from its lane of travel, but it left its lane when it was not safe to do so." 37 Kan. App. 2d at 130.

In *State v. Marx*, 38 Kan. App. 2d 598, 171 P.3d 276 (2007), a panel of our court held that an officer's observation of a motor home crossing the fog line followed by an overcorrection and then crossing the centerline was "an inherently unsafe maneuver" which justified reasonable suspicion that K.S.A. 8-1522 had been violated. The *Marx* panel declined to follow the *Ross* panel, interpreting the statute to mean that "a vehicle shall be driven as nearly as practicable entirely within a single lane of traffic." 38 Kan.

App. 2d at 608.

In neither of these cases was there any discussion of "possible impairment" as an alternative basis for reasonable suspicion. In contrast, here the officer clearly testified as follows:

> "Q. [Prosecutor:] When you stopped this vehicle, did you have any other reason for making this stop?
>
> "A. Just possible impairment of the driver in some way."
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> . . . .
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> "Q. At that point, DUI wasn't on your mind?
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> "A. No, I would say that based on the fact that that day I was working an overtime assignment on the Oz Fest concert, and Ozzy Ozbourne. That's the reason we were there, to interdict alcohol and narcotics arrest; that was the sole purpose to be out. When [the driver] went on over the line [on] those two [occasions], I stopped her on the violation with the thought she might be under the influence of alcohol and/or drugs."

In determining there was reasonable suspicion to justify the stop, the district judge did not rely solely on suspicion of the ordinance violation, but he relied as well on the

possible impairment:

> "Under the circumstances here, I think the fact that the driver not once but twice drove over onto the shoulder would indicate that there is a problem that drew [the officer's] attention. That's why he stopped the vehicle. Driving off onto the shoulder is oftentimes considered a possible cue of impairment. I believe that was basically what the officer was saying today. Although he didn't focus on that in his report and didn't indicate that that was a stated reason in the report. The cited—but as far as I'm concerned, the cited section of the Shawnee code was proper basis to effect the traffic stop in this case on the independent ground as well the driving twice off onto the shoulder is possible clue of impairment, an officer can make a stop here."

We need not rely solely on *Ross* or *Marx* in examining the district court's decision. Here there is substantial competent evidence that the stop was based in part on possible impairment, and we are unwilling to reweigh this evidence. Moreover, we are not inclined to disagree with the district court's legal conclusion given the totality of the circumstances here, including driving twice across the fog line within 3 blocks. See *State v. Field*, 252 Kan. 657, 664, 847 P.2d 1280 (1993); *United States v. Harris*, 928 F.2d 1113 (11th Cir. 1991). We conclude the stop was justified.

Was Detention of Passengers Unreasonably Extended by Further Questioning and a Second Search of Fitzpatrick?

Fitzpatrick next argues that even if the stop was justified, it was improperly extended. Generally, the length of an investigative detention cannot exceed the scope and duration necessary to complete the purposes of the stop. *State v. DeMarco*, 263 Kan. 727, 734, 952 P.2d 1276 (1998). Further detention must be based upon either the development of reasonable suspicion of criminal activity beyond the purpose or scope of the stop or a genuine transition to a consensual encounter. 263 Kan. at 734. As our Supreme Court has stated:

> "A law enforcement officer conducting a routine traffic stop may request a driver's license and vehicle registration, run a computer check, and issue a citation. When the driver has produced a valid license and proof that he or she is entitled to operate the car, the driver must be allowed to proceed on his or her way, without being subject to further delay by the officer for additional questioning. In order to justify a temporary detention for further questioning, the officer must also have reasonable suspicion of illegal transactions in drugs or of any other serious crime." *State v. Mitchell*, 265 Kan. 238, Syl. ¶ 4, 960 P.2d 200 (1998).

In determining whether the detention was unreasonably extended, we must focus first on the activities related to the basis for the stop and then on the facts that were

developed as a result of the initial detention. Here, the stop was based on the failure to stay in a single lane of traffic and the suspicion of driver impairment; both of these bases require only an investigation of the driver of the vehicle, not the passengers. As a result of this initial detention, the officer gained knowledge of an open container violation and was justified in extending the detention for the reasonable investigation thereof. Given that the only basis for suspicion of open container violation was that the second passenger (not Fitzpatrick) was observed with an open bottle of Bacardi mixed drink and that a subsequent search of the vehicle revealed no additional such containers, we are unconvinced that there was any development of facts upon which to base reasonable suspicion that Fitzpatrick was engaged in criminal activity.

Although the pat-down search of the vehicle's occupants was justified for officer safety, see *State v. Epperson*, 237 Kan. 707, 715, 703 P.2d 761 (1985), in the case of Fitzpatrick it resulted in no facts upon which to base any reasonable suspicion of criminal activity. Accordingly, we discern no basis to detain Fitzpatrick for further questioning or search absent whatever reasonable suspicion may have been gained by the second officer's observation of the bulge.

Our search of the record reveals no testimony of the officers wherein it is suggested that the observation of the bulge, standing alone, gave rise to reasonable suspicion of criminal activity. Moreover, the district court made no specific finding

regarding same; in fact, after reciting the aspects of the encounter, the court stated only that "this all follows in a logical connection as far as the Court is concerned." After examining the totality of the circumstances, we conclude that the mere observation of the bulge after Fitzpatrick had already proven free of weapons based on a pat-down search, did not give rise to any reasonable suspicion of criminal activity under the facts presented. The State has cited no authority for the notion that unusual clothing, posture, or other physical features, standing alone, give rise to reasonable suspicion of criminal activity. Here, neither officer articulated how the bulge gave rise to any such suspicion. See *State v. Toney*, 253 Kan. 651, 656, 862 P.2d 350 (1993) ("The officer making the stop must be able to articulate the basis for his reasonable suspicion.").

We recognize that the United States Supreme Court has apparently placed in doubt our well-established jurisprudence in Kansas requiring adherence during the detention to the original *scope* of the detention, thus prohibiting questioning outside that scope absent the independent development of reasonable suspicion. In *Muehler v. Mena*, 544 U.S. 93, 161 L. Ed.2d 299, 125 S. Ct. 1465 (2005), the Court seems to have abandoned this scope or purpose requirement of the detention, focusing exclusively on *duration* of the detention in a determination of unreasonableness. Regardless of whether our Supreme Court decides to follow *Muehler*, any shift in the law is irrelevant here, because the record clearly reflects that the original detention was indeed extended in duration after the bulge was noted; both officers turned their attention to an exploration

of the bulge, including the request for consent to the pocket search, and subsequent related activities.

Fitzpatrick should not have been subjected to any further questioning or search. Having concluded that nothing about the encounter justifiably raised the officers' reasonable suspicion of criminal activity or necessitated further detention of Fitzpatrick for questioning, the officers' detention of Fitzpatrick after the auto search and the pat-down search of this person was an unreasonable extension of the detention and the evidence recovered thereafter should have been suppressed unless Fitzpatrick's later consent to search his pockets purged the taint of his unlawful detention. See *Mitchell*, 265 Kan. at 243-44; *State v. Grace*, 28 Kan. App. 2d 452, 459-61, 17 P.3d 951, *rev. denied* 271 Kan. 1039 (2001). Here, the illegal detention and the request for consent were in close temporal proximity and did not purge the illegality. See *Grace*, 28 Kan. App. 2d at 460-61.

The State has urged us to not to address this issue because the argument was not made with specificity to the district court. Generally, we do not consider legal arguments on appeal that were not made to the district court, but there are exceptions to this general rule.

"There are several exceptions to the rule that a new legal theory may not be

asserted for the first time on appeal: (1) The newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) consideration of the theory is necessary to serve the ends of justice or to prevent denial of fundamental rights; and (3) the judgment of the trial court may be upheld on appeal despite its reliance on the wrong ground or that it assigned a wrong reason for its decision." *State v. Gonzales*, 36 Kan App. 2d 446, 454-55, 141 P.3d 501 (2006) (citing *State v. Schroeder*, 279 Kan. 104, 116, 105 P.3d 1237 [2005]).

We believe that an analysis of the unreasonable extension of the detention of Fitzpatrick involves only a question of law arising on facts that were not disputed below and is finally determinative of the suppression issue. Moreover, we have undertaken consideration of this analysis believing that it is necessary to serve the ends of justice and to prevent denial of Fitzpatrick's fundamental rights under the Fourth Amendment of the United States Constitution. We therefore hold the district court erred in not suppressing the marijuana found in Fitzpatrick's pocket due to the unlawful detention.

Fitzpatrick has argued other bases to suppress the evidence, but these are moot in light of our holding the district court erred in not granting the motion to suppress.

Reversed and remanded.

LARSON, J., concurring and dissenting: I concur in the result reached by the majority that Officer Phillip Burger had a reasonable articulable suspicion to stop the vehicle in which Daniel L. Fitzpatrick was a passenger. I dissent from the majority's conclusion that Fitzpatrick's detention was unreasonably extended for a second search after a fellow officer pointed out to Officer Burger a large, sandwich-bag size bulge in the front of Fitzpatrick's pants and the reversal of the trial court's denial of Fitzpatrick's motion to suppress.

As to our ruling that the stop was justified, I concur in that result. The majority has correctly reached that conclusion by a totality of the circumstances analysis. See *State v. Ramirez*, 278 Kan. 402, 406-07, 100 P.3d 94 (2004), relying on *State v. Crawford*, 275 Kan. 492, 496, 67 P.3d 115 (2003). This analysis coupled the conclusion that the driver twice drove across the fog line within 3 blocks as a clue of impairment with the fact of the two instances of driving onto the shoulder of the roadway as justifying the stop. I agree with this conclusion and result.

We have therefore left for another case and another day, and rightly so I believe, the issue a panel of our court and ultimately the Kansas Supreme Court will face in resolving the differences in the holding of *State v. Ross*, 37 Kan. App. 2d 126, 149 P.3d 876, *rev denied* 284 Kan. ___ (2007) (and its critic, *United States v. Jones*, 501 F. Supp. 2d 1284 [D. Kan. 2007]), and the later decision by another panel of our court in *State v.*

Marx, 38 Kan. App. 2d 598, 171 P.3d 276 (2007).

To properly understand and justify the reasons for my disagreement with the majority's decision as to the suppression issue, it is necessary to set forth the allegations of the motion to suppress first filed in this case, the testimony at the hearing where this motion was considered, and the district court's ruling on the motion.

In this case, there were two separate motions to suppress filed and two separate hearings. The second motion to suppress dealt with the stop. In light of our ruling on the first issue, it need not be discussed. The first motion to suppress dealt with the search of Fitzpatrick. These proceedings must be considered.

The motion to suppress Officer Burger's search of Fitzpatrick's pocket contended the search exceeded the scope of the consent given to search his pockets; the search of the bulge was based only "on a hunch," and the officer "literally grabbed a suspect's crotch with no reasonable and articulable suspicion" which was a "blatant disregard for police procedure and a suspect's bodily dignity."

The record clearly shows that the motion to suppress fails to make any claim or contention that the search violated the Fourth Amendment to the United States Constitution because Fitzpatrick's detention was unduly extended. In addition, as will be

shown from the summary of the testimony at the suppression hearing, there is no evidence as to the time frame of the stop and resulting searches.

Officer Burger was the only witness at the suppression hearing. He testified concerning the stop; upon seeing the front seat passenger holding an open bottle of bacardi mixed drink in plain view, the officer determined he was going to search the vehicle. He had the passengers exit the vehicle and asked for and obtained consent from Fitzpatrick for a pat-down search, which he accomplished without locating any contraband. Burger then searched the vehicle for more open containers.

When Burger completed his search of the car, he testified that Officer Joel Johnson, who had arrived on the scene earlier, told him that while Burger was doing the pat-down search of Fitzpatrick, Johnson "noticed a rather large bulge in Mr. Fitzpatrick's front of his pants." At this point, Burger testified he observed a large bulge in the front of Fitzpatrick's pants and he asked Fitzpatrick for his consent to search his pockets.

Burger testified the bulge was larger than Fitzpatrick's body parts. After Fitzpatrick gave his consent to the search, Burger stated that "I entered his pockets with my right hand and through his pocket I was immediately able to feel a plastic bag, sounded like a crinkle of a plastic bag." Burger testified the item was not actually in the right front pocket he was searching.

Burger then, over objection, testified to having recovered marijuana as evidence in his career over 500 times and that 90 out of 100 times it was in a plastic bag. He testified that he believed it was marijuana when he touched the plastic bag. The plastic bag, which the court later described as sandwich sized, was then marked for identification and stated to be in substantially similar condition as when recovered.

Burger then testified Fitzpatrick was calm when giving his consent. Burger said he asked for the consent in a normal tone, he did not yell, he did not threaten Fitzpatrick, he did not display his weapon, and that Fitzpatrick did not appear to be under the influence of alcohol or drugs. Burger then said he asked Fitzpatrick, "Do you have any marijuana in your pants." Fitzpatrick said he did not have any. Burger then testified he told Fitzpatrick he needed to take the marijuana out of his pants, to which he said Fitzpatrick responded that he could not do that.

Burger next testified that he said to Fitzpatrick that if Fitzpatrick did not recover it immediately, that he (Burger) would do it himself. At that point, Fitzpatrick took the bag out and handed it to Burger. Burger said he believed it to be marijuana because it had the feel of marijuana and Fitzpatrick had not disputed the fact when asked if he had marijuana in his pants.

Burger testified Fitzpatrick had not formally been placed under arrest up to the

point he had been told to take the marijuana out of his pants. He said it was not practical to leave to obtain a search warrant because Fitzpatrick could have left the scene.

When the prosecutor attempted to ask questions showing Fitzpatrick's previous contact with the criminal justice system, Fitzpatrick's counsel objected and stipulated Fitzpatrick was not objecting to the voluntariness of the consent–Fitzpatrick's objection was to the scope of the search.

Fitzpatrick's counsel effectively cross-examined Burger by showing the second consent was only to search the pockets and that Burger's report said he grabbed the bulge, although Burger testified, "I don't believe I grabbed it." There was further cross-examination about whether Fitzpatrick was free to leave. Burger first said Fitzpatrick was free to leave during the search, but he finally admitted Fitzpatrick was not free to leave at the time the marijuana in the plastic bag was removed from Fitzpatrick's pants.

On redirect, Burger denied he manipulated the pocket and said the bag was "wide enough [that if you] put it in the middle of your crotch you could put your hand in your pocket" and feel it. There was no further testimony at this hearing. As was earlier stated, no time line was given or requested and there did not appear to be any time lapse between the stop, observation of the open bottle, exit from the vehicle, pat-down search of Fitzpatrick, search of the vehicle, and then the search of Fitzpatrick's pockets.

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Fitzpatrick finally argued on appeal that "Officer Burger improperly extended the stop." This argument is the basis of the majority's conclusion that the trial court erred in denying Fitzpatrick's motion to suppress. However, it is clear from the language of the motion we have quoted that this argument was never presented to the district court. Further, from the extensive summary of the testimony at the suppression hearing that has been set forth, there is absolutely no evidence to show the stop was unduly extended.

It is our long-time appellate rule that issues not raised before the trial court cannot be raised on appeal. *State v. Shopteese*, 283 Kan. 331, 339, 153 P.3d 1208 (2007). This rule is based on the reasoning that an appellate court should not first consider an issue where the proceedings below deprived the district court the opportunity to address the claim and rule on it. See *State v. Rojas*, 280 Kan. 931, 932, 127 P.3d 247 (2006). *Shopteese* further teaches us:

> "Exceptions to this general rule may be granted if (1) the newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) consideration of the theory is necessary to serve the ends of justice or to prevent denial of fundamental rights; or (3) the judgment of the district court may be upheld on appeal despite its reliance on the wrong ground. *State v. Anthony*, 282 Kan. 201, 206, 145 P.3d 1 (2006)." 283 Kan. at 339.

I do not believe as the majority states that the issue decided is "only a question of law arising on facts that were not disputed below." Slip op. at 12. It is further important to my analysis of the search that there is no issue as to the voluntariness of the consents, since Fitzpatrick's counsel stipulated that voluntariness was not an issue.

None of the exceptions allowing a new legal theory to be raised for the first time on appeal exist in this case for several reasons.

First, there are neither admitted or proven facts that show the stop and detention was unduly extended. No time line was established by any of the testimony at the suppression hearing. Officer Jones noticed the bulge in Fitzpatrick's pants at the time Officer Burger was performing the pat down search. It is our long-established rule that the knowledge of one peace officer is imputed to fellow officers. *State v. Niblock*, 230 Kan. 156, 161, 631 P.2d 661 (1981). The intrusion into Fitzpatrick's right pants pocket was made necessary by Jones' objective observation of what was ultimately found to be a sandwich-size bag of marijuana. We should not be required to consider whether the duration of the stop was unduly extended in this case.

But, if we must reach this issue, it is our general rule that an investigative detention must last no longer than is necessary to effectuate the purposes of the stop. *State*

v. DeMarco, 263 Kan. 727, 734, 952 P.2d 276 (1998) (citing on *Florida v. Royer*, 460 U.S. 491, 500, 75 L. Ed. 2d 229, 103 S. Ct. 1319 [1993]). However, *DeMarco* teaches us, quoting *United States v. Mendez*, 118 F.3d 1426, 1429-30 (10th Cir. 1997), that "'further questioning is permissible only if (1) the encounter between the officer and the driver [suspect] ceases to be a detention, but becomes consensual and the driver [suspect] voluntarily consents to additional questioning. [Citation omitted.]'" 263 Kan. at 734.

This analysis should not have to go any further in our case because there was a clear stipulation on Fitzpatrick's part that he did not challenge the voluntariness of his consent to the search, only its scope. At no point did he contend before the district court that his detention was not consensual.

In addition, in this case, the officer admitted that Fitzpatrick was free to go up to the point the officer felt the bag of marijuana. The officer further testified that Fitzpatrick was not free to go at the time the marijuana was removed by Fitzpatrick from his pants.

To determine whether an encounter is consensual raises the question of whether a reasonable person would feel free to leave, with this issue being determined by looking at the totality of the circumstances. See *State v. Moore*, 283 Kan. 344, 351-54, 154 P.3d 1 (2007). This analysis consists of two parts: first, the factual underpinnings of the district court's decision are reviewed under a substantial competent evidence standard; second,

the ultimate legal conclusion drawn from those facts, *i.e.*, whether a reasonable person would feel free to leave, is reviewed under a de novo standard. 283 Kan. at 352.

In our case, Burger was informed by Jones of the bulge in Fitzpatrick's pants and Burger immediately asked for consent to search Fitzpatrick's pockets. Burger did not yell or threaten Fitzpatrick, he did not display a weapon, the request was made in a calm voice, and the search was conducted in public. The crowning fact is Fitzpatrick's clear consent to the search.

There is clear evidence that the detention was consensual. Testimony was given that Fitzpatrick's response was normal and he did not appear intoxicated. Fitzpatrick points to no facts that suggest a reasonable person would have been so intimidated by the surrounding circumstance the person would not believe he or she could refuse to consent to the search. See *U.S. v. Delgado*, 466 U.S. 210, 216, 80 L. Ed. 2d 247, 104 S. Ct. 1758 (1984). The extension of the detention was consensual, and the resulting search of the pocket was consensual.

Fitzpatrick has failed to show that the detention issue is determinative in this case, nor is it necessary to prevent denial of fundamental rights. The claimed unreasonable extension of detention was not argued in the district court, it has no factual or legal basis upon which relief should be granted, and it was improperly utilized by the majority

opinion in this case as the basis to reverse the district court's denial of the motion to suppress the consensual, voluntary search.

Because the district court should be affirmed, I also briefly reach the two contentions made on appeal which were raised in the district court and are proper for consideration on appeal.

Based on the facts, it is clear that Officer Burger did not exceed the scope of Fitzpatrick's consent as has been claimed.

However, when a "search is properly authorized . . . by consent . . . the scope of the search is limited by the terms of its authorization." *Walter v. United States*, 447 U.S. 649, 656-57, 65 L. Ed. 2d 410, 100 S. Ct. 2395 (1980). Here, Fitzpatrick's consent was limited in scope to his pockets. Fitzpatrick maintains that the officer's act of "grabbing" at the bag of marijuana located in the crotch area exceeded the consent given.

The State points to Burger's testimony that he could feel the bag of marijuana and recognized the crinkle of the bag while within the scope of consent given by Fitzpatrick. We need not repeat our Kansas approval of the plain feel doctrine which is set forth in *State v. Wonders*, 263 Kan. 582, 590-91, 952 P.2d 1351 (1998) (citing *Minnesota v. Dickerson*, 508 U.S. 366, 375, 377-78, 124 L. Ed. 2d 334, 113 S. Ct. 2130 [1993]). The

whole thrust of the motion to suppress was that the officer exceeded the extent of the consent to search. That contention was considered in the district court and denied. The court commented on the substantial size of the sandwich bag stuffed with marijuana and found that "the officer upon placing his hand in the pocket did feel this bag." The judge further said in his ruling;

> "[A]t that point in time I know there is a question here whether he grabbed or whether he had been given consent to feel inside the pocket but he had, he had permission to reach inside the pocket that opened the door as to feeling the bag. This all follows in a logical connection as far as the Court is concerned. The officer would have been remiss at that time to feel the bag and then just ignore it."

By this ruling, the district court clearly found the officer's actions to be proper and the scope of the search not to have been exceeded.

Fitzpatrick has made no showing that the search improperly exceeded the scope of the consent that was given. The officer denied in his testimony that he grabbed at the bag. He testified on redirect that he did not have to manipulate the pocket in order to feel the bag. The officer described the pocket as "wide enough [that if you] put it in the middle of your crotch you could put your hand in your pocket [and] you are going to feel it." This description corresponds with the district court's observation that the size of the bag was "a rather substantial object to conceal in the groin area."

There was clearly substantial competent evidence to support the conclusion that the officer did not make an improper intrusion or violate Fitzpatrick's privacy rights to the extent that there were differences in the testimony, and these questions were properly resolved by the trial court. Fitzpatrick has failed to show that the officer exceeded the scope of the consent to search that was given.

Fitzpatrick finally argues that the officer did not know what the bulge in Fitzpatrick's crotch area was until he grabbed the bulge, thus manipulating the object. This contention has been largely answered in my discussion of whether the scope of the consent to search was exceeded.

However, based on the officer's testimony of his familiarity of marijuana packaged in plastic bags and the feel and crinkle of the bag, Burger indicated that he immediately believed the substance to be marijuana. As was said in *State v. Lee*, 283 Kan. 771, 779, 156 P.3d 1284 (2007):

> "This court adopted the plain feel exception to the requirement for a search warrant in *State v. Wonders*, 263 Kan. 582, 592, 952 P.2d 1351 (1998). The requirements for the plain feel exception are: '"1) [T]he initial intrusion which afforded authorities the plain view is lawful; 2) the discovery of the evidence is inadvertent; and 3) the incriminating character of the article is immediately apparent to searching authorities."' *Wonders*, 263 Kan. at 592, 598 (quoting *State v. Galloway*, 232 Kan. 87, Syl. ¶ 2, 652

P.2d 673 [1982]). 'Immediately apparent to searching authorities' has been interpreted to mean that the officer must have probable cause to believe that the object is evidence of a crime. *Wonders*, 263 Kan. at 597-98."

In this case, the district court found that the officer's training and experience led him to believe the bag was marijuana at the time it was felt. The officer's testimony was that the feel of the bag of marijuana on Fitzpatrick was consistent with his prior experiences in other seizures of the drug. Although the officer admitted on cross-examination that his notes suggested that he had grabbed the bag, his testimony was that he had not done so. He testified on redirect that he was able to feel the bag without manipulation.

Based on the record, there is substantial competent evidence that the bag of marijuana was immediately apparent to the officer prior to manipulating the bag. The plain feel exception was properly applied based on the trial court's rulings on the evidence presented.

My conclusion that the district court should be affirmed is not changed by the majority's reference to *Muehler v. Mena*, 544 U.S. 93, 161 L. Ed. 2d 299, 125 S. Ct. 1465 (2005), and the suggestion that the scope or purpose of the detention is not critical, but rather that the duration of the detention is the critical issue. The underlying holding of *Muehler* reversed a 42 U.S.C. § 1983 (2000) judgment against police officers for

violation of the Fourth Amendment rights of the occupant of a house who was detained in handcuffs for 2 to 3 hours while a search warrant seeking weapons and evidence of gang membership was being executed. See 544 U.S. at 98-102.

One of the issues considered by the United States Supreme Court was whether it was a violation of Mena's Fourth Amendment rights to question her about her immigration rights during the detention. Chief Justice Rehnquist's opinion pointed out that the Ninth Circuit Court of Appeals' decision that the officers were required to have independent reasonable suspicion in order to question Mena about her immigration status was faulty; the *Muehler* opinion then continued:

> "We have 'held repeatedly that mere police questioning does not constitute a seizure.' *Florida v. Bostick*, 501 U.S. 429, 434 (1991); see also *INS v. Delgado*, 466 U.S. 210, 212 (1984). '[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage.' *Bostick, supra*, at 434-435 (citations omitted). As the Court of Appeals did not hold that the detention was prolonged by the questioning, there was no additional seizure within the meaning of the Fourth Amendment. Hence, the officers did not need reasonable suspicion to ask Mena for her name, date and place of birth, or immigration status.
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> "Our recent opinion in *Illinois v. Caballes*, 543 U.S. 405 (2005), is

instructive. There, we held that a dog sniff performed during a traffic stop does not violate the Fourth Amendment. We noted that a lawful seizure 'can become unlawful if it is prolonged beyond the time reasonably required to complete that mission,' but accepted the state court's determination that the duration of the stop was not extended by the dog sniff. *Id.*, at 407. Because we held that a dog sniff was not a search subject to the Fourth Amendment, we rejected the notion that 'the shift in purpose' 'from a lawful traffic stop into a drug investigation' was unlawful because it 'was not supported by any reasonable suspicion.' *Id.*, at 408. Likewise here, the initial *Summers* detention was lawful; the Court of Appeals did not find that the questioning extended the time Mena was detained. Thus no additional Fourth Amendment justification for inquiring about Mena's immigration status was required." 544 U.S. at 101.

In our case, there is absolutely no evidence to sustain a finding that the detention was unduly extended. It was not an issue before the district court. It is not a proper issue for our consideration on appeal. The decision of *Muehler* does not compel that the district court's denial of Fitzpatrick's motion to suppress should be reversed.

For all of the reasons stated, I would affirm the district court.