

**SUPREME COURT OF LOUISIANA**

**NO. 00-K-2836**

**STATE OF LOUISIANA**

**V.**

**ZACHARY LIPSCOMB**

**ON WRIT OF CERTIORARI TO THE  
FOURTH CIRCUIT COURT OF APPEAL**

**Johnson, J., Dissenting**

I disagree with the majority's conclusion that defendant's claim of ineffective assistance of counsel must be relegated to post-conviction relief.

The court of appeal concluded that the seizure of the evidence in this matter exceeded the scope of the frisk and could not be justified under the "plain feel" exception recognized in *Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed. 2d 334 (1993) and that defense counsel rendered ineffective assistance by failing to move before trial to suppress the evidence. A claim of ineffectiveness is generally relegated to post-conviction relief, unless the record permits definitive resolution on appeal. *State v. Prudholm*, 446 So.2d 729 (La. 1984). However, when the record contains sufficient evidence to decide the issue of ineffective assistance of counsel, and the issue has been raised by assignment of error on appeal, this court will review the complaint "in the interest of judicial economy." *State v. Hamilton*, 92-2639 (La. 7/1/97), 699 So.2d 29, 31; *State v. Ratcliff*, 416 So.2d 528,530 (La. 1982).

In this case, defendant was convicted in 1998 and was sentenced to serve four years in prison. If this claim is relegated to post-conviction relief, by the time this court reviews the matter, defendant may well have completed his sentence, and the issue would be moot. The record clearly contains all of the evidence necessary

to consider the issue of ineffective assistance of counsel. It is clear from the record that defendant's counsel failed to file a motion to suppress. The record also contains the transcript containing the testimony of the police officer who seized the evidence and the events surrounding defendant's arrest. Therefore, the record is sufficient to evaluate defendant's claim on the merits.

After reviewing the facts surrounding the seizure of the evidence, I agree with the Court of Appeal that the evidence was illegally seized under *Dickerson, supra*, in that its identity was not immediately apparent to be a weapon or contraband. Accordingly, I would affirm the decision of the Court of Appeal.