

Friday, August 15, 2008

### **How can a proper Terry patdown find crack cocaine?**

Â Bill of Rights.Â (From the public domain.)Â Â Recently during a suppression hearing in a drug case, the police officer testified that controlled dangerous substances fell to the ground from my client's pantsÂ as the cop conducted a patdown for weapons, on the cop's claimed belief that this was a valid Terry stop. Â During cross examination at the suppression hearing, I asked the cop to show how my client was frisked, by putting me into the role of the client, which gave the judge a good bellylaugh as he proclaimed that I would be responsible for anyÂ contraband found duringÂ the cop's patdown of me in court. This so-called patdown demonstration revealed the very manipulation that is prohibited with TerryÂ patdowns. The judge later indicated he tended to agree with me that the cop had demonstrated an unlawful TerryÂ patdown, but the judge had concluded that the officer had probable cause to search based on the alleged odor of unburnt marijuana (I join the argument here that unburnt marijuana ordinarily is too hard to distinguish from lawful substances). Probable cause does in fact permit squeezing and sliding of suspected contraband, but a Terry stop does not allow that. Â About the limits of a TerryÂ frisk, in *Minnesota v. Dickerson*, 508 U.S. 366, 378Â (1993), the Supreme CourtÂ upheld the suppression of the drugs seized from Mr. Dickerson's pocket, the Supreme CourtÂ explained: "Where, as here, 'an officer who is executing a valid search for one item seizes a different item,' this Court rightly 'has been sensitive to the danger . . . that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will.' *Texas v. Brown*, 460 U.S. at 748 (STEVENS, J., concurring in judgment). Here, the officer's continued exploration of respondent's pocket after having concluded that it contained noÂ weapon was unrelated to 'the sole justification of the search [under Terry:] . . . the protection of the police officer and others nearby.' 392 U.S. at 29. It therefore amounted to the sort of evidentiary search that Terry expressly refused to authorize,Â Â see *id.* at 26, and that we have condemned in subsequent cases. See *Michigan v. Long*, 463 U.S. at 1049, n.14; *Sibron*, 392 U.S. at 65-66."Â Â *Dickerson*, 508 U.S. at 378.Â How, then,Â can a proper TerryÂ frisk -- which is not permitted toÂ involve manipulation, sliding or squeezing -- determine the presence of crack cocaine in one's pocket? If the crack rock is the typical small one-dose size, it sounds particularly farfetched. Nevertheless, in one Virginia criminal case,Â a police officer claimed to have felt apparent crack cocaine in Mr. Dickerson's pocket during a TerryÂ patdown. The trial judge refused to suppress, and so did Virginia's intermediate appellate court, the Court of Appeals. See *Bandy v. Virginia*, \_ Va. App. \_ (August 12, 2008). Something sounds seriously wrong here, and I hope the defense seeks appellate relief.Â Jon Katz.

Posted by Jon Katz in Drugs at 00:00