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Plain feel searches: Ripe for challenge.

Terry v. Ohio, 392 US 1 (1968), is one more tool for police to trample on the Fourth Amendment right against unreasonable searches and seizures. Minnesota v. Dickerson, 508 U.S. 366 (1993), opens the door for cops using "plain feel" to pull non-weapon items from people's pockets during Terry frisks, on probable cause that the item is contraband. (Image from public domain). In 1993, the United States Supreme Court opened the door for cops using "plain feel" to pull non-weapon items (rather than just suspected weapons) from people's pockets during Terry frisks (392 US 1 (1968)), on probable cause that the item is contraband. Minnesota v. Dickerson, 508 U.S. 366 (1993). Fortunately, the Supreme Court agreed that the seizure of crack cocaine from Mr. Dickerson violated his Fourth Amendment rights in the foregoing case, since the cop, during a Terry frisk, recognized that the lump in his clothing "was contraband only after 'squeezing, sliding and otherwise manipulating the contents of the defendant's pocket' -- a pocket which the officer already knew contained no weapon." Minnesota v. Dickerson, 508 U.S. at 378. In upholding the suppression of the drugs seized from Mr. Dickerson's pocket, the Supreme Court 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 no 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," 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." Dickerson, 508 U.S. at 378. In 1996, Maryland's highest court gave judges some additional things to consider in determining whether a drug seizure during a Terry frisk meets Dickerson's strict requirements that the seizure not take place with any feeling beyond a frisk required for seeking weapons, and that the seizure be upon probable cause: "To be sure, Officer Ottey's testimony provided a general description of his experience in conducting drug searches. It did not disclose, however, the number of times Officer Ottey had identified crack cocaine through a layer of clothing during previous pat-down searches or describe how crack cocaine feels to the touch. That testimony, thus, did not tend to explain how Officer Ottey was able to identify crack cocaine by touch; it did not shed any light on the reliability of his opinion in that regard. In fact, aside from the opinion, the only other evidence of the officer's tactile acuity was his affirmative response to the question whether, in the past, he had found crack cocaine on defendants while patting them down." The State also elicited from Officer Ottey testimony regarding how crack cocaine typically is packaged, but, having done so, did not further attempt to connect that testimony to the search in question. In short, Officer Ottey's suppression hearing testimony that it was immediately apparent to him that what he felt was crack cocaine was nothing more than a conclusion and, as such, could be rejected. L. McLain, Maryland Evidence § 705.1. n10. After hearing Officer Ottey's testimony, the motions judge described Officer Ottey's level of certainty as a 'suspicion' and commented, 'It could be many things there that could give that same sense of touch. That's the troubling aspect of it.' It is clear, therefore, that the motions judge was not convinced that this difficult identification was justified on the basis of the evidence before him." Jones v. State, 343 Md. 448, 464-65 (1996). The foregoing discussion in Jones v. State also applies to Fourth Amendment reviews beyond Terry frisks, including such situations as my client who was acquitted because the trial judge ultimately agreed that the cop who stopped him for having a dead taillight did not have sufficient information late at night to have formed probable cause that the two grams of material in a package on the floor was marijuana. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00