

Monday, November 20, 2006

### **Cop says he routinely pats down people.**

Recently I had a disturbing -- yet revealing -- conversation with a police officer who charged my client with possessing marijuana. This case was in Virginia, where my client faced up to thirty days in jail for the marijuana possession charge. As I waited for our case to be called for trial, the arresting officer agreed to speak with me so long as the prosecutor was present. He proceeded to tell me that he stopped my client for speeding. He said he patted down my client down for his own safety, which he said he routinely does. Yow! The Supreme Court limits patdowns to situations where a police officer has reasonable, articulable suspicion to believe that the patdown will find contraband, ordinarily a weapon. This police officer was running afoul of this Terry decision. Before I spoke with the cop and before the drug chemist arrived by my subpoena (Virginia law provides for the drug certificate of analysis to be admissible in evidence if the chemist is not subpoenaed to testify), the prosecutor refused my suggestion of a deferred disposition for marijuana (to dismiss the case in six months or a year, without any finding of guilt upon satisfaction of agreed conditions for the dismissal, but to permit the defendant to be found guilty and sentenced without necessitating a trial in the event of a violation of the dismissal conditions). Shortly after the cop left the room after telling me about his inclination to pat down people, the prosecutor offered a deferred disposition for drug paraphernalia. To this day, I do not know whether it had anything to do with what the police officer told me about the incident. On the other hand, this underlined how preparing a case to go to trial makes it more likely to settle, while preparing a case to settle makes it more likely to go to trial. As an aside, as the police officer left the meeting room, he said "Thank you for being polite." I responded with my mini-achievement, "I can do it" (meaning being polite with my adversary). Another prosecutor chimed in "On the road to recovery." I caught up with the cop as he left the courthouse, and asked him how he thought his routine patdown approach jibed with the Supreme Court's Terry decision. He told me he knew about Terry. He said that lawyers previously attacked his routine patting-down policy in court, and claimed that none had been successful in gaining any ground about that approach. He spoke of one factor being his age of forty and the need to check more spry eighteen-year-olds for weapons. For my case, I could have advised my client to go to trial, but I expected that the officer would have thrown in some specifics for having reasonable and articulable suspicion that my client was armed (which he was not), which included his alleged significant nervousness, and the nighttime roadside location. Suppressing this patdown -- which was followed by my client's allegedly fessing up that the hard object in his pocket was a pot pipe -- was no shoe-in. I give credit to the cop for at least being willing to talk over our differences about patdown searches. As my political opponent Dick Thornburgh e-mailed to me earlier this year after I bumped into him on the street and e-mailed him about this blog entry I posted about him, it is preferable to disagree agreeably. However, with this cop, I'll feel more agreeable with him if he would start adhering to the Terry decision. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00