



Police Law Bulletin



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Fourth Circuit Court of Appeals



Terry Frisk Could Not Justify Search of Defendant's Bag

U.S. v. Buster, No. 21-4101 (Feb. 22, 2022). On September 22, 2019, officers in Richmond, Virginia responded to a report of domestic assault where a firearm was discharged in the air. About 30 minutes later, the officers spotted the suspect walking down a sidewalk. One officer asked to speak with the defendant, who refused and kept walking. The officer yelled at the defendant, and the defendant ran away but almost immediately tripped and fell. The officers caught up with Buster while he was still on the ground and tackled him. Buster was wearing a cross-body bag whose pouch ended up in front of him as he fell. Perceiving that Buster was clutching or reaching for the bag, the officers pulled Buster's arm away from the bag, pulled the bag to the rear of Buster's body, and handcuffed him. Buster said the bag's strap was choking him, so one of the officers cut the strap, grabbed the bag, and removed it from Buster's person. The bag felt hard to the touch which in the officer's experience indicated it may contain a weapon. The officer opened the bag and found a gun and a box of ammunition.

The officers began questioning Buster at the scene without first advising him of his *Miranda* rights. The officers took Buster to the police station where they asked more questions. Eventually, an officer realized they had neglected to read Buster his *Miranda* rights. About 10 minutes later, the officer advised Buster of his *Miranda* warnings, and elicited the same material discussed in the pre-*Miranda* interview.

Buster was charged with possession of a firearm by a convicted felon. He filed a motion to suppress the firearm, ammunition and various statements arguing that they were obtained in violation of the Fourth and Fifth Amendments. The district court granted Buster's motion to suppress his pre-*Miranda* and post-*Miranda* statements, finding the latter were the product of impermissible two-step interview tactic barred by *Missouri v Seibert*, 542 600 (2004). The district court denied Buster's motion with regards to the gun and ammunition, finding that the

bag was properly opened because officers had reasonable suspicion that the defendant was armed and dangerous.

Buster plead guilty preserving his right to appeal the denial of his motion to suppress. Buster was sentenced to 51 months imprisonment. On appeal, the Fourth Circuit Court of Appeals reversed.

The sole grounds argued by the government and found by the trial court in support of the search of the defendant's bag was that the search amounted to a protective frisk under *Terry v. Ohio*, 392 U.S. 1 (1968). A *Terry* frisk is generally a pat down of an individual's outer clothing when there is reasonable suspicion to believe that the individual is armed and dangerous. The purpose of a *Terry* frisk is to ensure officer safety. When a defendant is secured and has no access to nearby property, *Terry* cannot be expanded to justify searching the property for officer safety. Quickly frisking an unsecured suspect is simply not the same as methodically searching the contents of a bag to which a suspect no longer has access—particularly where the suspect remained restrained and under the officers' physical control. That the officer felt a hard object in the bag did not justify treating the defendant as armed once the defendant was cuffed and secured. The court held, "a doctrine authorizing a limited warrantless search to protect officer safety cannot be stretched to cover situations where there is no realistic danger to officer safety."

The defendant's plea was therefore vacated, the order denying the suppression motion reversed, and the matter was returned to the district court for proceedings.

Under Totality of Circumstances, Stop Was Not Supported By Reasonable Suspicion

U.S. v. Drakeford, 992 F.3d 255 (Mar. 26, 2021). In August 2017, a confidential informant advised police that a light skinned black male, heavyset, with a full beard was trafficking cocaine and heroin. The informant provided the suspect's vehicle tags but did provide a name or address. The informant also never provided the police with any "predictive" information about when and where the suspect would be selling drugs.

Through further investigation, police linked the vehicle tag to the defendant and discovered he had a record of drug arrests (although police were not aware of any convictions arising from the prior arrests).

Two months after receiving the tip, police located an address believed to belong to the suspect. One month later, police conducted surveillance on the address over ten times and over the course of two more months but never saw the defendant. Police were then able to link the suspect to a female and surveilled her residence as well, where they did see the defendant over 30 times but, never witnessed any drug transactions.

On February 1, 2018, while police were watching the female's home, the defendant left that location and traveled to a gas station. Someone parked next to the defendant and entered his vehicle for 30-45 seconds, and then got back into their own vehicle and left. Police followed that vehicle and observed driving consistent with impairment. A search of that vehicle revealed syringes, but no drugs. Police believed that this was significant given that the person had just

been in the defendant's presence. A few days later, the defendant traveled to a different convenience store and parked, but eventually left without anything happening.

A detective contacted the informant to try and arrange for a purchase of heroin. According to the informant, the defendant stated he was awaiting resupply. Later that day, officers observed the defendant travel to another home and walk inside. Another car arrived at the location and a person entered the home with several bags. The defendant left after about an hour and was carrying a bag. Police followed the defendant. During the trip, the informant contacted police and informed them that the defendant had called and stated that he now had drugs to sell.

Several days later, the defendant was observed traveling to a car stereo store. He parked in front of the store, directly in front of surveillance cameras for the business, and sat inside the vehicle. The area was a public, busy parking lot in the middle of the day and was not considered a high crime area. Another car parked in the area and two men exited that vehicle. The defendant exited his car at the same time and the men approached each other. Officers saw a quick handshake between the defendant and one of the men, and a few minutes later observed another handshake, apparently of slightly longer duration than the first. Officers believed the latter to be a hand-to-hand drug transaction, although no money or drugs were observed. All three men then entered the store together. A detective followed and saw the men talking with a store employee at a counter. One of the men had a bookbag by his feet and used his foot to bring the bag closer to his body when the detective walked by. The men left the store and continued talking together outside. Officers approached and detained the defendant. A pat-down revealed a bulge in the defendant's pocket which the officer immediately knew to be drugs. Based on the drugs found in the defendant's pocket, police obtained a search warrant for the home of the female associated with the defendant and found additional contraband.

The defendant was charged with various drug distribution and firearms offenses. Defendant filed a motion to suppress the evidence from the frisk that occurred in the parking lot of the car stereo store as well as the evidence found through the search warrant, claiming that the stop was unlawful and the evidence found from the warrant was the fruit of an unlawful search. The district court denied the motion, finding the stop and frisk supported by reasonable suspicion. The defendant pled guilty, reserving his right to appeal the denial of the motion, and was sentenced to 210 months. On appeal, the Fourth Circuit unanimously reversed.

Throughout the investigation of defendant, officers relied on information provided by a confidential informant. There was little information in the record regarding the informant's reliability, and the informant provided no more information about the defendant other than his vehicle tags and a vague description. This was not sufficient to connect the defendant to drug activity. And, despite the informant's ability to communicate with the defendant, officers never attempted to confirm the informant's allegations by setting up a controlled buy between the informant and the defendant, nor did they seek any predictive information that would lend to her credibility. Thus, the tip was entitled to only "little weight" in the analysis.

The officers' extensive surveillance provided them with nothing more than a single suspected drug exchange in which officers found no drugs, even after searching the vehicle that was suspected to be involved, and another incident in which defendant simply drove to a gas station,

parked, and left. Additionally, despite surveilling defendant over the course of several months – 10 times at the address associated with him and more than 30 times at the female’s address – officers never observed suspicious behavior or drug transactions at these locations. Thus, these events do little to elevate the officers’ hunch that defendant was involved in drug trafficking to reasonable suspicion.

Finally, officers waited about a week from the time they suspected that the defendant had resupplied before stopping him. Characterizing the defendant’s actions in the car stereo parking lot as being typical of a drug transaction, the detective testified that he would expect one person to exit the vehicle, enter the other vehicle, exchange drugs, leave their vehicle, and then leave the transaction. Here though, the suspected transaction occurred outside of the cars and the men went shopping thereafter, instead of re-entering their respective vehicles and leaving the scene. That these events occurred in the middle of the day in a busy, public area under the eye of store security cameras further cut against reasonable suspicion. Moreover, the officers’ testimony about the alleged hand-to-hand transaction in the parking lot was merely conclusory—no property was observed changing hands, and nothing about the handshake was otherwise suspicious, even considering all the circumstances. According to the court:

[W]e cannot hold that officers’ bare suspicion of drug trafficking -- without more -- can allow even an experienced officer to reasonably conclude that such a benign and common gesture can be viewed as an exchange of drugs. This cannot amount to reasonable, particularized suspicion. The Fourth Amendment does not allow the Government to label a person as a drug dealer and then view all of their actions through that lens.

Concluding, the court observed:

Taken together with the uncorroborated informant information and the inconclusive surveillance detectives had conducted in which no drugs were ever located, [defendant]’s presence at the Car Stereo Warehouse failed to create reasonable suspicion sufficient to justify a Terry stop. Given all of the foregoing, ‘we are skeptical of Government attempts to spin . . . largely mundane acts into a web of deception.’