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A Frisk Too Far: Limited Search Necessary Before Performing a Full Search

By **Daigle Law Group**

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United States v. Brown brings us to the Ninth Circuit. It also highlights two court cases, *Terry v. Ohio* and *Sibron v. New York*.

The first case, *Terry v. Ohio*, is a Supreme Court case that held a police officer correctly limited his protective search to, “what was minimally necessary to learn whether the men were armed and to disarm them once he discovered weapons.” The officer had reasonable suspicion that three men were planning to commit a robbery. The officer kept his search to only patting down “the outer clothing” of the three men, and he “did not place his hands in their pockets or under the outer surface of their garments until he had felt weapons...then merely reached for and removed the guns” that he felt.

In *Sibron v. New York*, a companion case to *Terry*, the Court found that it was unreasonable for an officer to immediately “thrust his hand” into a suspect’s pocket without first making any attempt to conduct a limited search for weapons. Officers believed that Sibron was engaging in narcotics trafficking “merely because he spoke with drug addicts” and the Court held that this “did not constitute probably cause for a warrantless search.”

With these two cases in mind, let’s examine what happened in *United States v. Brown*.

FACTS

Two police officers responded to a motel after receiving a report from motel staff concerning two “transients” in the motel parking lot. The caller reported that one of the individuals was a white male who had a bike and who had been seen urinating in the bushes and the other individual was a female.

When officers Robert Wining and Robert Nasland arrived, they encountered James Brown and Jon Bartlett seated on a low cinder block wall in the parking lot. Bartlett fit the description provided by the caller, as he was a white male who had a bike with him. Brown did not fit the description of either of the reported individuals, as he was an African American male and had no bicycle with him.

Brown told the officers that he was staying at the motel and Bartlett stated that he was not staying at the motel, but that he was there to help Brown “to get some stuff” out of a U-Haul van located in the parking lot. Officer Wining was skeptical of Bartlett’s story because, in his experience, he knew drug deals were common for the area. In addition, Officer Wining saw a small Leatherman-brand multi-tool that was still in its packaging that was located on top of the cinder block wall between Brown and Bartlett. When Officer Wining asked Bartlett if he was selling the tool to Brown he said, “No,” and then claimed that he just found the unopened package “under a bridge.” While asking about the multi-tool, Officer Wining noticed that Brown “put his hands down to his sides” and that he then “reach[ed] his index finger into his right pocket.” Officer Wining then ordered Brown to stand up and turn around. Officer Wining explained, “I saw you reaching in that pocket,” and when Brown denied that he had done so, Officer Wining said, “Yeah, you were.” Brown complied with Officer Wining’s instructions and allowed Officer Wining to secure his arms behind his back in a finger hold. Pointing with his free hand to Brown’s pants pocket, Officer Wining asked, “What’s in here?” Brown responded, “I’m not quite sure.” Officer Wining then reached into Brown’s pocket and pulled out a plastic bag. Brown claimed that it was coffee, but after inspecting it, Officer Wining said, “That is not coffee, James, that’s heroin.” Officer Wining conducted a more thorough search of Brown, finding several thousand dollars, several unused syringes, and suboxone strips used to treat opioid withdrawal.

The government charged Brown with possession with intent to distribute heroin. Brown filed a motion to suppress the evidence seized by Officer Wining. First, Brown claimed that Officer Wining violated the Fourth Amendment because Officer Wining seized him without having reasonable suspicion that he was involved in criminal activity. Alternatively, Brown argued that, even if Officer Wining had reasonable suspicion to detain him under *Terry v. Ohio*, the search of his pocket exceeded the scope of a *Terry* frisk.

NINTH CIRCUIT COURT OPINION

The district court denied Brown’s motion to suppress, finding that Officer Wining’s actions were “reasonable in light of the totality of the circumstances.” Upon conviction, Brown appealed.

First, the Court concluded that the officers’ encounter with Brown was consensual until the point at which Officer Wining ordered Brown to stand up and turn around. At that point, the court held that Brown’s seizure was justified because, by that time, Officer Wining had developed reasonable suspicion that Brown was engaged in a drug transaction with Bartlett.

Next, the court concluded that Officer Wining had justification to conduct a protective frisk. However, the court held that Officer Wining's search of Brown's pocket exceeded the permissible scope of such a frisk.

In this case, as in *Sibron*, the court held that Officer Wining did not bother to conduct an "initial limited" search for weapons or conduct any other less intrusive examination, but instead proceeded to immediately search Brown's pocket. The court added that there were no "special factors" present that might have justified Officer Wining's immediate search of Brown's pocket. The court also commented that the government cited no Supreme Court or Ninth Circuit case that has upheld a "pocket search" as the initial means of conducting a protective search of a fully compliant detainee during a *Terrystop*. As a result, the court held that the district improperly denied Brown's motion to suppress the evidence seized from his pocket.

TAKEAWAYS

The key takeaways here happen when we compare *Sibron* and this case. While it is easier to just get right to where we know evidence may be (in this case it was pretty obvious something was in Brown's pocket from this actions), you have to take the necessary steps to get there in order to protect yourself and your evidence. Had Officer Wining conducted an initial limited search and thought he felt something in Brown's pocket, the Ninth Circuit's conclusion may have gone differently.

United States v. Brown, 996 F.3d 998 (9th Cir. 2021)

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