



The First Circuit upholds the District Court's denial of the Defendant's motion to suppress after concluding that the seizure of contraband from the Defendant's shorts did not violate the "plain feel" doctrine.



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In *United States v. Rasberry*, 882 F.3d 241 (1st Cir. 2018), the United States Court of Appeals for the First Circuit was asked to review a District Court's denial of Defendant Todd Rasberry's motion to suppress. During a Terry stop, a DEA officer patted Rasberry down and felt a softball-sized object in Rasberry's shorts which the DEA agent believed contained drugs. The DEA agent was proven to be correct, and Rasberry was arrested. Rasberry argued in his motion to suppress that the seizure of the contraband from his shorts violated the "plain feel doctrine" established by the United States Supreme Court in *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993). The District Court and the First Circuit rejected Rasberry's argument and found, instead that, as in most Terry stops cases, the reasonableness of the search and seizure is informed by the totality of the circumstances. The relevant facts established at the suppression hearing conducted by the District Court are as follows.

For some years, Paul Wolf, a DEA agent, had been on the trail of a major drug dealer known to him only as "Champagne." Though Champagne proved elusive, Wolf finally got a lead indicating that he was in fact a man named Todd Rasberry. With the help of a cooperating source, Wolf was able to track down one of Rasberry's accomplices while she was making drug deliveries in Portland, Maine. When Wolf confronted the accomplice, she surrendered the heroin that she was carrying and told Wolf that he would find Rasberry, along with more drugs, at a motel room that she had rented in Scarborough, Maine. The accomplice gave Wolf a key to the motel room and consented to its search.

Accompanied by other officers, Wolf proceeded to the motel where Rasberry was. The officers knew that Rasberry had a criminal history, including drug and weapons charges, and the officers knew that Rasberry had been arrested only a few months earlier at a party where guns were present. As a result, the officers were armed and wore ballistic vests.

When the officers arrived at the motel, Wolf tried the room key that he had been given by Wolf's accomplice, but it did not work. Accordingly, Wolf knocked, and Rasberry opened the door and acknowledged that he was a guest in the motel room that had been rented by Wolf's accomplice. The officers told Rasberry that they were there to search the premises and that, although he was not under arrest, he would be detained while they conducted the search. One officer placed Rasberry's hands behind his back and handcuffed him; he then patted Rasberry down but only the portion of Rasberry's lower back that Rasberry might be able to reach despite being handcuffed. Two other officers, with weapons drawn, conducted a sweep of the premises to make certain that nobody else was present.

The officers searched the motel room for approximately twenty minutes. They found plastic sandwich bags, needles, and a digital scale, but no drugs. With the search winding down, Rasberry asked if the handcuffs could be removed. Wolf replied that, before he could remove the handcuffs, he had to make sure that Rasberry did not have a weapon. As Wolf performed a pat-down, he felt (in the groin area of Rasberry's shorts) a hard, round object about the size of a softball. Wolf inquired as to the nature of the object, and

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Rasberry responded that it was part of his anatomy. At that point, Wolf—confident that the object was not part of Rasberry’s anatomy but, rather, was contraband—placed Rasberry under arrest. Reaching into Rasberry’s undershorts, Wolf extracted a ball of baggies containing what appeared to be controlled substances. A field test subsequently confirmed that some of the baggies contained heroin and others contained cocaine.

Thereafter, a federal grand jury returned a three-count indictment against Rasberry for various controlled substance offenses. Rasberry moved to suppress the drugs seized from his person, arguing that the search and seizure had violated his Fourth Amendment rights. The District Court held a hearing on Rasberry’s motion to suppress and later denied the motion. In its Order, the District Court held that what had transpired constituted a lawful Terry stop; that placing Rasberry in handcuffs was reasonably necessary to ensure the officers’ safety; and that the duration of the detention was reasonable because the officers were diligently searching the room during the time prior to his arrest.

Finally, the District Court upheld the seizure of the drugs from Rasberry’s undershorts on two alternative grounds. First, the District Court held that the drugs were lawfully seized under the “plain feel” doctrine. Second, the District Court concluded that, in light of the totality of the circumstances, the officers had probable cause to arrest Rasberry, to search him incident to his arrest, and to seize the drugs.

Eventually, Rasberry entered a conditional guilty plea to a single count of possession of heroin with intent to distribute, and the District Court sentenced him to a 138-month term of imprisonment. This timely appeal followed.

Rasberry tendered four arguments on appeal as to why the District Court erred in denying his motion to suppress. First, Rasberry asserted that his detention in the motel room exceeded the lawful scope of a Terry stop. Second, Rasberry argued that the pat-down during which the softball-sized object was discovered was conducted without reasonable suspicion. Third, Rasberry claimed that the seizure of the softball-sized object was not justified under the “plain feel” doctrine. Fourth, Rasberry contended that the search of his undershorts was so invasive that it offended both his dignity and his right to privacy under the Fourth Amendment.

As for the scope of the Terry stop, the First Circuit began by explaining that the Fourth Amendment does not prohibit all searches and seizures. Instead, the Fourth Amendment prohibits unreasonable ones. A brief investigatory stop (sometimes called a Terry stop) based on a reasonable suspicion that criminal activity may be afoot does not violate the Fourth Amendment, even in the absence of probable cause. Conversely, an arrest requires that the detaining officer have probable cause to believe that a crime has been committed. The First Circuit further explained that judicial review of a Terry stop involves a two-step process. One, the stop must be justified at its inception. Two, as the stop proceeds, the officers’ actions must be reasonably related in scope to the circumstances which justified the interference.

Rasberry argued that the officers’ actions were not reasonably related in scope, including the duration of the stop, and that the stop morphed into a de facto arrest that required the officers to have probable cause, something that they did not have according to Rasberry. Indeed, the Government conceded that the officers did not have probable cause to arrest Rasberry when they entered the motel room.

The First Circuit opined that the dispositive question in determining whether police action is a Terry stop or a de facto arrest is whether a reasonable person standing in the suspect’s shoes would understand his position to be tantamount to being under arrest. In making this determination, a reviewing court must judge the officers’ actions under the totality of the circumstances. Typically, such an inquiry involves examining, among other things, the length of the detention, the restrictions placed on an individual’s personal movement, the force (if any) that was exerted, the information conveyed to the detainee, and the severity of the intrusion.

That being said, officers must be allowed, during the course of such a stop, to take measures that are reasonably calculated to protect themselves or others from harm. To pass scrutiny, such measures must be proportionate to the perils associated with the particular circumstances. Security precautions, such as the use of handcuffs, must be based on the officers' reasonable belief that the use of such restraints was necessary to carry out the legitimate purposes of the stop without exposing law enforcement officers, the public, or the suspect himself to an undue risk of harm.

In this case, the First Circuit agreed that, under the totality of the circumstances, the officers' actions were reasonable. The officers were in a small motel room, with thin walls, with a suspected drug dealer, who had a history of weapons possession. Accordingly, the First Circuit agreed with the District Court that the officers had a reasonable basis to suspect that Rasberry might be armed and dangerous.

Moreover, the First Circuit concluded that the twenty-minute duration of the stop was not unreasonable, nor did it convert the Terry stop into a de facto arrest because the officers were actively investigating during the entirety of the twenty-minutes. Accordingly, the First Circuit agreed that the officers' actions constituted a permissible Terry stop.

Next, the First Circuit noted that a police officer may frisk a suspect on reasonable suspicion that the suspect is armed and dangerous. In fact, the First Circuit stated that, under some circumstances, a second frisk may be justified.

In this case, the First Circuit agreed with the District Court that, because the first frisk was restricted to Rasberry's lower back, the District Court did not err in finding that Wolf had a reasonable suspicion that Rasberry might be carrying a weapon elsewhere on his person and that the second frisk (i.e., the one that led to the discovery of the drugs) was justified.

Third, the First Circuit held that the District Court did not err in finding that Wolf had probable cause to arrest Rasberry and to seize the softball-sized object incident to his arrest. In reaching this conclusion, the First Circuit explained that the "plain feel" doctrine provides that a police officer can seize an object if, by touch, its incriminating character is immediately apparent. In other words, the doctrine permits an officer who conducts a lawful pat-down of a suspect's outer clothing to seize an object if its incriminating character is immediately apparent by touch alone. The First Circuit agreed that there was ample evidence presented at the suppression hearing with which the District Court could find that Wolf had probable cause to arrest Rasberry based upon the "plain feel" of the foreign object in Rasberry's shorts that turned out to be narcotics.

Finally, the First Circuit rejected Rasberry's intrusiveness argument out-of-hand. The First Circuit noted that, in order to justify a search of a particularly intimate area, an officer must, at a minimum, have reasonable suspicion that the person detained is hiding contraband there. Wolf had just encountered a suspicious object near Rasberry's groin, and therefore, the First Circuit agreed that Wolf had an excellent reason to think that Rasberry had contraband hidden in his undershorts. Accordingly, the First Circuit affirmed the District Court's denial of Rasberry's motion to suppress.