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Constitutional Law--Stop and Frisk--Reasonableness Under the Fourth Amendment

John Michael Anderson
West Virginia University College of Law

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CASE COMMENTS

Constitutional Law—Stop and Frisk—Reasonableness
Under the Fourth Amendment

Terry was convicted by a state court of carrying a concealed weapon on evidence obtained by the arresting officer who had observed Terry and two other men engaged in unusual conduct. The unusual conduct of the men had lead the arresting officer to believe the men were contemplating a daylight robbery. Acting on this belief, the officer stopped and frisked the men, discovering a gun in Terry's pocket. Terry was convicted in the state court of carrying a concealed weapon. Held, affirmed. Under certain suspicious circumstances a police officer is justified in making a limited search for weapons even though there is no probable cause for arrest. Terry v. Ohio, of Ohio, 392 U.S. 1 (1968).

The Terry case represents the first time the Supreme Court has squarely faced the question of whether a police officer may constitutionally stop and frisk\(^1\) a suspect without his consent, in the absence of adequate grounds for an arrest.\(^2\) Traditionally the Supreme Court has held that governmental intrusion upon one's personal security, as guaranteed by the fourth amendment,\(^3\) is legitimate only when there exists probable cause for an arrest.\(^4\) Actually what the fourth amendment guarantees is not protection against all searches and seizures, but only those that are unreasonable.\(^5\)

The test of reasonableness has traditionally been probable cause.\(^6\) The novelty of the Terry case lies in the fact that probable cause

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\(^1\) For purposes of this article, these terms are used only to denote certain police activities and their use is not an attempt to aid in the resolution of the difficult constitutional questions concerning these practices. The Court emphatically rejects the notion that these terms, stop and frisk, can be used to manipulate the requirements of the fourth amendment. Terry v. Ohio, 392 U.S. 1 (1968).


\(^3\) "The right of the people to be secure in their persons, papers, and effects, against unreasonable searches and seizures, shall not be violated..." U.S. CONST. amend. IV.


\(^6\) The Supreme Court has said probable cause for a search and seizure exists where the facts and circumstances, within the arresting officer's knowledge, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. Carroll v. United States, 267 U.S. 132 (1925). The substance of all definitions (of probable cause) is a reasonable ground for belief of guilt. Id.
for an arrest did not exist. The Court, in *Terry*, raises the question whether it is always unreasonable for a police officer to stop and frisk a suspect when probable cause for an arrest does not exist.

In approaching the difficult question of the constitutional propriety of a stop and frisk, it is first necessary to separate the stop from the frisk. This can best be accomplished by a discussion of what the majority opinion in *Terry* did or did not say concerning each issue. Though the majority stated that the crux of the case was the propriety of the frisk, it is the opinion of some that substantial comments was made on the propriety of the initial stop. Justice Harlan in a concurring opinion stated that the majority implicitly said that a protective search may always be made when the stopping is justified. Thus, for Justice Harlan, the stop was the important issue, because once "such a stop is reasonable . . . the right to frisk must be immediate . . . if the reason for the stop exists."

The majority in *Terry* indicated that there are two types of stops; one is an investigative stop and the other a forcible stop. The former may be more appropriately termed an approach and question, while the latter a seizure within the meaning of the fourth amendment.

The majority reasoned that there is a legitimate governmental interest in crime prevention and detention and, in the appropriate circumstances and manner, a police officer may approach an individual in order to investigate possible criminal behavior. However, given these generalities, the Court did not go into particulars to establish guidelines governing what will constitute appropriate circumstances in order to justify the approach and question. Moreover, the Court in *Terry* decided nothing concerning the constitutional propriety of the investigative stop. Since street

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8 *Id.* at 15.
9 *Id.* at 23.
12 *Id.*
13 *Id.* at 15.
14 The reason for the use of this term is the fact that the Court in *Terry* recognized that police officers have a legitimate investigative function for the prevention and detention of crime and the usual means to accomplish this is by approaching an individual and asking questions.
15 *Terry v. Ohio*, 392 U.S. 1, 22 (1968). The usual means for carrying out this function is by questioning a suspect. Inquiry is recognized as a utilitarian step in the criminal process. 1965 U. Ill. L. Rev. 119, 123.
encounters are "incredibly rich in diversity," the Court stated that investigation or approach and question is permissible under the right circumstances without specifying what activities would constitute these circumstances.

Possibly of somewhat more significance was the Court's determination of when a seizure, or forcible stop, is effectuated. The Court held that this forcible stop occurs when a police officer "by means of physical force or show of authority, has in some way restrained the liberty of a citizen." However, the Court said that it could not decide from the facts in Terry whether such a forcible stop occurred prior to the officer making physical contact with Terry. Thus, it seems a seizure, which is governed by the fourth amendment, occurs at that point in the encounter when a citizen may not disregard questions posed to him and freely walk away.

It is perhaps unfortunate that the majority avoided the question of the limitations upon the investigative stop. By so doing, the Court detoured the more difficult problems of the stop and frisk altercation. However, the intentional ambiguity on this issue will make it quite simple for the Court to give the Terry ruling a very narrow interpretation, should subsequent police activity warrant such a course.

The Court has declared that it is "not unmindful" of the needs of society for efficient law enforcement. In the wake of present day civil disorders and the rising amount of injuries and deaths

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17 Id. at 13.
18 Id. at 22.
19 Id. at 19.
20 Id.
21 Here again the Court established a generalized standard without giving particular guidelines as to what action will or will not constitute restraint or show of authority. The situation is hardly conceivable where an officer would approach an individual to investigate his suspicious behavior and then allow that suspect to disregard questions and freely walk away, without first insisting upon a satisfactory explanation of his behavior. In many instances failure to answer a few questions may make an already suspicious police officer more suspicious. Thus, by so insisting upon answers the officer may either use physical force or show of authority thereby constituting a seizure by the Court's definition.
23 Id. at 125.
to police officers there is apparent the need to protect police from being subjected to assaults while in the course of their investigative function. Moreover, the police have an affirmative duty to protect lives and property and there exists a bona fide public interest in police investigative practices. As the Court stated, "[I]t would have been poor police work indeed for an officer of thirty years experience" not to have investigated Terry's behavior.

The Terry case is not a retreat from a prior holding that whenever practical a police officer must obtain prior judicial approval, i.e. a search warrant, to conduct a search. The Court only sanctioned those certain circumstances where there is a need for swift action based upon on-the-spot observations by the officers. Each case must be decided on its own merits and the limitations the fourth amendment places upon protective frisks must be developed in concrete factual circumstances.

The particular circumstances necessary to make a frisk constitutionally reasonable in the absence of probable cause for an arrest may be indicated by observing the facts in the Terry case. Though the particular acts of the men may have appeared innocent in themselves, when viewed as a whole it was not unreasonable to assume the men were contemplating a robbery, calling for further investigation. Since robberies generally involve the use of weapons, the Court held under these circumstances the frisk was reasonable. To clarify what circumstances will justify a frisk in the absence of probable cause, the Court decided Sibron v. New York, as a companion case. In Sibron there was also a conviction resulting from evidence obtained by a frisk. However, there the court held that the

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26 Id. at 23.
27 Id. at 20.
28 Implicitly the Court is saying that because of the police officer's legitimate function there have to be some sanctions available to the officer to protect himself. And that these sanctions should be available even though the existing facts are insufficient to establish probable cause for an arrest.
30 Id. at 29.
31 The facts showed that the officer, with 39 years police experience, observed Terry and two others engaged in unusual conduct. Routinely one of the men would walk down the street, look into a particular store window, walk on, turn around, look again in the same store window, and then return to the other men. This would immediately be followed by a conversation between the men. The same procedure went on approximately twelve times. The officer testified that he suspected the men of "casing a job, a stick-up" and feared "they have a gun." Id. at 6.
officer's actions were not reasonable in conducting the risk. From the facts it was apparent that at no time did the officer have any reasonable apprehension that Sibron was armed and presently dangerous. There may have been some justification for believing that criminal activity was afoot. However, the activity was not of such nature that would have led a reasonably prudent police officer to believe it involved the use of weapons.

Thus it is the apparent rule from the Terry and Sibron decisions that a police officer is only acting reasonably, i.e. within the fourth amendment, in frisking a suspicious person when there exists a reasonable apprehension of danger to the officer or those in the immediate vicinity. This rule is qualified by the fact that the officer must be acting as a reasonably prudent man. Further, under the particular circumstances the suspected crime must be of such a nature that it would involve the use of weapons.

The officer must be able to point to specific and articulate activities of a suspect to determine if the acts reasonably suggest a crime, and the crime is one which is characterized by violence and the use of weapons. A hunch of good faith on the officer's part is not sufficient. If the crime is not one so characterized the officer is not justified in his frisk without a search warrant; consequently, any action on his part without such a warrant will be unreasonable. Such suspected crimes as robbery, assault, murder, forcible rape,

32 Id.
33 Sibron was convicted of unlawful possession of heroin. The facts showed that while the officer was patrolling his beat, he observed Sibron continually for eight hours. That during this time the officer saw Sibron in conversation with six or eight narcotic addicts. Officer testified that nothing was overheard and nothing was seen to pass between any of these men. Sibron went into a restaurant and spoke to three more addicts. While eating, the officer approached Sibron and asked him to come outside. Once outside, the officer said, "You know what I am after", whereupon he thrust his hand into Sibron's pocket, discovering heroin. The court held the search could not be justified as a self-protective search for weapons. Id.
35 [T]his type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. Terry v. Ohio, 392 U.S. 1, 27 (1968).
36 Id.
37 Id. at 21.
39 Kuh, In-Field Interrogation: Stop, Question, Detention and Frisk, 3 CRIM. L. BULL. 597 (1967).
abduction, and burglary are surely examples of crimes which would warrant a frisk under the principles established by the Court.

Some factors a police officer may find helpful to use as guidelines in observing a suspect include: the suspect is demeanor, his mannerisms, whether or not the officer has knowledge of his background, any information received from a third person, what, if anything, the suspect is carrying, any strange bulges in suspect's clothing, whether there has been recent criminal activity in the vicinity, the officer's experience, the geographic area, and if there is an immediate danger to life or property.

Though circumstances exist sufficient to justify the frisk, the Court further requires that the officer identify himself and then make reasonable inquiry as to the nature of the individual's behavior. If the responses are insufficient to dispel the officer's reasonable apprehension, the officer may then conduct a limited frisk. The scope of the frisk itself also has strict limitations. Since the justification for the frisk is the protection of the officer, its scope must be limited to those outer areas of the clothing which can be used to conceal weapons. Once these various procedures are followed "any weapons seized may properly be introduced in evidence against the person from whom they were taken."

Some recent Supreme Court decisions have been criticized for their apparent tendency to weigh the balance between effective law enforcement and individual personal security too much in favor of the latter. The Terry decision may represent a departure in the thinking of the Court which would have the effect of weighting the balance somewhat more in favor of law enforcement, at least in the area of crimes of violence.

John Michael Anderson

43 Terry v. Ohio, 392 U.S. 1, 28 (1968).
44 Id.
45 Id.
46 E.g., Miranda v. Arizona, 384 U.S. 436 (1966). The suspect must be warned that he has the right to remain silent, that any statement he makes may be used against him, and that he has the right to counsel whether or not he can afford. Escobedo v. Illinois, 378 U.S. 478 (1964). The accused has the right to counsel and the refusal to honor his request constitutes a denial of this right as guaranteed by the sixth amendment; and any statement made under these conditions cannot be used against him. Mapp v. Ohio, 367 U.S. 643 (1961). The fourth amendment was applied to the states through the fourteenth amendment.