MARYLAND STATE'S ATTORNEYS' ASSOCIATION
3300 North Ridge Road, Suite 185
Ellicott City, Maryland 21043

David Daggett
(c) 410.979.3356

O - 410.203.9881

Steven Kroll
(c) 410.979.3354

95. OCTOBER BLOG, 2022

Terry vs. Ohio: How well do you really know it?

With a dearth of *interesting* criminal cases emanating from our appellate courts, I thought this would be a good opportunity to provide a refresher on one of the most iconic cases in United States Supreme Court jurisprudence: *Terry v. Ohio*, 392 U.S. 1 (1968), arguably the single - most important case that police and prosecutors need in their day-to-day lexicon and certainly one of my favorites.

The Facts

It was a cold, drab and dreary Thursday, October 31, 1963 in downtown Cleveland, Ohio. All the leaves were brown and the sky was gray and would grow significantly grayer as President John F. Kennedy would be assassinated just three weeks later. A gumshoe by the name of Marty McFadden was on foot patrol in plain clothes, when at approximately 2:30 in the afternoon his attention was drawn to two men – John Terry and Richard Chilton, who were standing on the corner of Huron Road and Euclid Avenue. While Detective McFadden couldn't say precisely what it was about the two individuals that drew his attention, over his 35 years' experience as a detective he had developed a pretty good eye for shoplifters and pickpockets. His interest piqued; McFadden took a covert position near the entrance of a store about 300 to 400 feet away from the suspected ne'er-do-wells.

Over the next few minutes, McFadden observed one of the men walk a short distance away and glance into a store window. He then walked past the window a short distance, turned around and walked back, again pausing to look in the same store window. He then rejoined his crony and they had a brief conversation. The second man then went through the same gyrations: strolling down Huron Road; pausing to look in the same store window; walking past it; turning around; looking into the same store window; and re-joining his companion and holding a brief discussion. The two men repeated this same little dance routine five or six times apiece, stopping to stare into

the window approximately 20 - 24 times. At this point the plot thickens and they were joined by a third man, who briefly engaged them in conversation before leaving the two and walking away. Terry and Chilton continued their mysterious machinations for another few minutes, whereupon they then walked off together in the same direction taken by the third man.

McFadden, now on high-alert, suspected the two men of casing the joint in preparation of a stick-up. Fearing that they may be packing heat, McFadden followed them and saw them stop in front of Zucker's Fine Men's Haberdashery to talk to the same third man they had conversed with just a short time earlier. At this point McFadden leaped into action and confronted the three men, identifying himself as a lawman and asking for their names. When the men responded with something along the lines of "Puddin'n'tain. Ask me again I'll tell you the same" McFadden grabbed Terry, positioning him between McFadden and the other two reprobates and patted down the outside of his clothing. In the left breast pocket of Terry's overcoat, McFadden felt a pistol. He reached inside the overcoat pocket but was unable to remove the gun. He then removed Terry's overcoat and was able to retrieve a .38-caliber snub nose. He then had all three men assume the position and patted down the outer clothing of Chilton, as well as the third man, who was ultimately identified as Katz. Another revolver was felt (and recovered) in the outer pocket of Chilton's overcoat. The only item Katz was packing was a Pez dispenser.

McFadden later testified that he only patted down the men to see whether they had any weapons and that he did not put his hands beneath the outer garments of either Terry or Chilton until he felt their guns. After seizing the guns, all three men were ushered into the store and the proprietor was asked to call for back-up. After being transported to the station, Chilton and Terry were charged with carrying concealed weapons. Katz appears to have been sent on his way with a stern finger-wagging and a fatherly admonition to find a better circle of friends.

Motion to Suppress

On the motion to suppress the guns, the prosecutor argued that the guns were recovered during a search incident to a lawful arrest. The trial judge – obviously much sharper than the prosecutor – rejected that theory, instead holding that the officer, on the basis of his experience, "had reasonable cause to believe...that the defendants were conducting themselves suspiciously, and some interrogation should be made of their actions." The Court went on to hold that, purely for his own protection, Det. McFadden had the right to pat down the outer clothing of the men, who he had reasonable cause to believe might be armed. The court distinguished between an investigatory "stop" and an arrest and between a "frisk" of the outer clothing for weapons and a full-blown search for evidence of crime. The court held that the frisk was essential to the proper performance of the officer's investigatory duties, for without it "the answer to the police officer may be a bullet." It went on to hold that the pistols discovered during the frisk were admissible. *Id* at p. 8. Terry and Chilton were ultimately convicted.

The Supreme Court

The United States Supreme Court granted certiorari to determine whether the admission of the handguns was in violation of the Petitioner's Fourth Amendment rights. It must be remembered that 1968 was one of the most tumultuous years in this nation's history, with social issues such as the heightening of our involvement in Viet Nam, student protests, the civil rights movement, inner-city riots, Martin Luther King and Robert Kennedy being assassinated, gender equality, and the Democratic Republican National Convention in Chicago but just a few examples. Needless to say, there was a general mistrust of the police and the government in general among certain segments of society.

Against this backdrop the justices acknowledged the sensitive nature of rubber-stamping the police practice of "stopping and frisking" suspicious persons. It required balancing the police authority to confront dangerous situations on city streets versus the argument that that authority must be strictly circumscribed by the law of arrest and search to avoid exacerbating police-community tensions.

In oral argument, the government contended that a distinction should be made between a "stop/detention" and an "arrest" as well as between a "frisk" and a "search." It was urged by the prosecution that the police should be allowed to confront a person and detain him briefly for questioning upon suspicion that he may be involved with criminal activity. Upon suspicion that the person may be armed, the police should have the power to "frisk" him for weapons. If the stop and frisk generates probable cause to believe the suspect has committed a crime, then the police would then have the right to arrest and search incident thereto.

The Court spent considerable time discussing the plusses and minuses of the exclusionary rule and its effects on police conduct. On one hand, the exclusionary rule operates to some degree to curtail unconstitutional police action. On the other hand, it cannot deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo a successful prosecution in the interest of serving some other goal. *Id* at p. 14. The Court cautioned that nothing in the *Terry* opinion should be taken as indicating approval of police conduct not meeting constitutional muster. The Court stressed that "trial courts would still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which treads upon personal security without the objective evidentiary justification which the Constitution requires." *Id* at p. 15.

The Court's Holding

The Supreme Court recognized that whenever a police officer contacts an individual and restrains his freedom to walk away, a seizure has occurred. It also stressed that whenever a police officer conducts an exploration of the outer surfaces of a person's clothing and puts his hands all over his or her body in an attempt to find

weapons, a serious intrusion on the sanctity of the person has taken place and is not to be undertaken lightly.

The Court determined that in this case, Det. McFadden "seized" Terry and subjected him to a "search" when he took hold of him and patted down the outer surface of his clothing. It was at that factual point that the Court had to determine whether it was *reasonable* for McFadden to act as he did. Remember, the Fourth Amendment doesn't prohibit *all* warrantless searches and seizures, only unreasonable ones. In determining whether McFadden's actions were reasonable, the Court had to address two questions – whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place. *Id* at p. 20.

Had the actions of Det. McFadden been deemed to have constituted an "arrest," the Court would have had to determine whether probable cause existed. Here, such was not the case. The conduct in question involved "on-the-spot" observations of the officer on the beat, which could not be subject to the warrant procedure and instead had to be judged on "reasonableness." *Id* at p. 20.

In determining reasonableness, the Court weighed the particular governmental interest the officer was seeking to protect versus the intrusion on the interests of the private citizen. In other words, the Court had to balance the officer's suspicion of a possible armed robbery and potential danger to the officer, store personnel and customers versus the intrusion on personal security which the seizure and frisk caused to our villains.

In justifying the government's actions in such scenarios, a police officer must be able to point to specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant that intrusion. Id @ p.21. In making that determination, Courts must determine whether the facts available to the officer at the moment of the seizure or the frisk "warrant a man of reasonable caution in the belief that the action was appropriate." Id @ pp. 21, 22.

The Seizure

Applying the balancing test, the Court spent little time and words in determining that Det. McFadden's interest in thwarting a potential armed robbery far out-weighed the inconvenience of Terry, Chilton and Katz being briefly detained while the situation was investigated. The on-going actions of Terry and Chilton, as viewed through the eye of an experienced police officer more than justified a brief investigatory detention.

The Frisk

Determining the propriety of the justification of searching the scoundrels for weapons proved to be a much more arduous and taxing issue. The Court took notice of the fact that 57 law enforcement officers were killed in the line of duty in 1966 and that

335 officers were killed between 1960 – 1966. 1966 also saw 23,851 assaults on police officers, of which 9,113 resulted in injuries to said officers. Of the 57 officers killed in 1966, 55 died from gunshot wounds, 41 of them inflicted by handguns easily concealed on the killer's person. See Footnote 21 *Id* @ p. 24. In light of those numbers, the Court could not ignore the need for law enforcement officers to protect themselves and other potential victims of violence in situations where they may lack probable cause to make an arrest. While it would seem to be unreasonable to deny police officers the right to take the steps necessary to determine if a person is carrying a weapon, the Court still had to take into consideration the nature and level of the intrusion on individual rights. A search for weapons in the absence of probable cause to arrest must be strictly limited by the exigencies which justify the action. The Court determined that those police actions must be strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby. In other words, when checking for weapons, something less than a full search must be utilized.

The Court concluded 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 the officer has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man* in the circumstances would be warranted in the belief that his safety or that of others was in danger...And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his* inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he* is entitled to draw from the facts in light of his* experience." Id @ p. 27.

Finally, the Court examined the manner in which the seizure and search were conducted and opined that evidence may not be introduced if it was discovered by means of a search and seizure which were not reasonably related in scope to the justification for their initiation. The sole justification of the search is the protection of the police officer (and others nearby) and it must be limited to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer. *Id* at p. 29.

Det. McFadden's Actions

The Court noted that Det. McFadden did not place his hands in any of the men's pockets or under the outer surface of their garments until he had felt weapons, and then he merely reached for and removed the guns. He never did invade Katz' person beyond the outer surface of his clothing as he discovered nothing on Katz that appeared

* The Court only used the subject pronoun "he" and "man" as opposed to "she" and "woman." Being enlightened and a man of the world, I would have added "her," "she" and "woman," though I am sure that will elicit criticism as well. To paraphrase the old Virginia Slims cigarette slogan, "I've come a long way, Baby," though probably still not far enough.

to be a weapon. Det. McFadden limited his search of the three man strictly to what was minimally necessary to learn whether they were armed and to disarm them once he discovered the weapons. He did not conduct a general exploratory search for evidence of any criminal activity other than weapons.

Holding

Once the Court balanced the facts and circumstances (and reasonable interpretation thereof) observed by Det. McFadden, it determined that a reasonably prudent man (person) would have been warranted in believing that Terry and Chilton were armed and thus presented a threat to the officer's safety while he was investigating the suspicious behavior.

The Court ultimately reached the well-reasoned determination that Det. McFadden's actions were constitutionally appropriate, holding:

> ....where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken. Affirmed.

Conclusion

I know what you're thinking: That's a lot of flowery language from the Supreme Court, but what does it mean in layman's terms? Using the KISS principle, a *Terry* stop and frisk has two requirements:

1. In order to make the initial stop/detention, there must be reasonable articulable suspicion to believe that a crime is occurring, has occurred, or is about to occur; and
2. In order to conduct the frisk, there must be additional reasonable articulable suspicion to believe that the person is armed and dangerous.

A *Terry* pat down is meant to protect the officer, not to recover evidence. While *Terry* doesn't require the officer to be *certain* the person is armed and dangerous, there must be "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrants the intrusion." *Thornton v. State*, 465 Md. 122, 142 (2019), (quoting *Sellman v. State*, 449 Md. 526, 541 (2016.)

Reasonable articulable suspicion takes into account the totality of the circumstances and each situation is fact specific. Courts will ask: Would a reasonably prudent police officer have felt that they were in danger, based on reasonable inferences from particularized facts in light of the officer's experience? See ***Bailey v. State***, 412 Md. 349 (2009). Due deference is given to an officer's training and experience. The Court noted in ***Bailey*** that the officer involved was a patrol supervisor with over 20 years of law enforcement experience.

In addition, *Terry v. Ohio* must be read as prohibiting "pat downs for officer safety." If every suspect coming into contact with the police could be automatically "patted down for officer safety" then *Terry v. Ohio* would have no meaning (since the police wouldn't *need* RAS to believe the person is armed and dangerous) and I would have just wasted the past two days of my life writing this blog...and you would have wasted the last half hour of your life reading this drivel.

Far be it from me to tell you that you cannot conduct pat downs for officer safety as I sit home in the comfort of my living room watching The Real Housewives of Missoula, Montana while you are out patrolling the mean streets of New Market or Chevy Chase, so do what you need to do to be safe. Just be aware that should you conduct a pat down that the trial judge deems lacking in reasonable suspicion, the result could very well be the suppression of any evidence recovered. We'd all be a little disconsolate if that handgun you recovered from the illegal pat down had been used in a triple homicide.

So what can you do?

You can always ask for consent to pat the person down. Just remember that consent must be freely and voluntarily given. You cannot say, "You don't mind if I pat you down for weapons, do you?" as you are actually conducting the pat down. And it goes without saying that you can't use their refusal to grant consent as forming the basis of your RAS. In other words, you can't rationalize that "only a person that has a weapon on them would refuse consent so that makes me believe they have a weapon on them."

Should you find yourself in a situation in which weapons or other contraband ("Plain Feel Doctrine," See *Minnesota v. Dickerson*, 508 U.S. 366 (1993)) are recovered during a *Terry* pat down, make sure you include in your report ***everything*** that caused you to have a reasonable suspicion that the person was armed and dangerous. The following are some of the factors that courts should take into consideration in determining whether the pat down was in fact "reasonable." Some of them on their own might be enough. Others – standing alone - clearly will not be, so the more you have the better:

- What crime is being investigated;
- Evasive body language;

- Suspect was wearing baggy clothing that could easily conceal a weapon;
- Location and time;
- The number of suspects versus the number of officers;
- Evasive actions on the part of the suspect;
- Was a weapon found on another member of the group prior to the pat down of the other party;
- Lighting;
- What type of crime were the police investigating;
- Any inconsistent statements made by the suspects;
- Any known criminal records or history of violence;
- Were any of the suspects known to carry a weapon previously;
- Were they wearing gang colors;
- Was it a high-crime or drug-related neighborhood;
- Was there evasive or excessively nervous behavior;
- Furtive movements;
- Failure to follow orders;
- Aggressive or hostile behavior;
- Refusal to remove their hands from their pockets;
- Bulges in their pockets or waistband;
- Providing false names or false identification; and
- Anything else you can think of that may relate to a person possibly being armed.

AS ALWAYS, PLEASE CONSULT WITH YOUR LOCAL STATE'S ATTORNEYS' OFFICE WITH ANY SPECIFIC QUESTIONS REGARDING THE SUBJECT MATTER LOCATED HEREIN...

AND REMEMBER...BE CAREFUL OUT THERE!

A historical marker stands at the scene of the arrest made by Cleveland Police Department Hall of Fame Detective Martin McFadden. McFadden was a 38-year veteran when his actions on the job triggered the Supreme Court decision in *Terry* officially sanctioning the law enforcement tactic known as "stop and frisk."

McFadden joined the Cleveland Police Department in 1925 and was shortly promoted to detective. He was considered an expert in criminal tricks and tactics and gave presentations on how to avoid becoming a victim of criminals as well as how to catch them.

Martin McFadden retired from the Cleveland Police Department in 1970 after carrying a badge and gun for 45 years. He died in 1981 of cancer, but his legacy lives on. Stop and frisk continues to serve as a tool for police officers to prevent crimes, as well as save countless police and civilian lives. The legality of this technique's proper use has been upheld repeatedly and even expanded upon. This would not probably surprise McFadden. When the street-smart detective was asked what he thought about the Supreme Court's decision to affirm his actions, he simply said, "I knew I was right, and I was."