

# **TERRY STOP UPDATE**

## *The Law, Field Examples and Analysis*

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In the next two editions of the "Quarterly Review," a comprehensive look at the law of "stop and frisk" will be presented. This edition will focus exclusively on various aspects of a *Terry* stop. The next edition will continue with an analysis of various aspects of a *Terry* frisk.

### **INTRODUCTION**

The *Terry Stop* (also known as an "Investigative Detention" or "Stop and Frisk") is the authority to conduct an investigative detention and frisk of a criminal suspect. It is arguably the most significant piece of case law evolution supporting officer safety and proactive patrol and investigation in the twentieth century. When properly applied, it permits law enforcement officers and agents to interdict a crime before it occurs and allows them to protect themselves from a potentially deadly assault in the process. While this body of law traces its roots to the 1968 Supreme Court case of *Terry v. Ohio*,<sup>1</sup> there have been several noteworthy developments in this body of law over the last forty years, several in the year 2000 alone. This article is intended to serve as a brief overview of the current state of the law for easy reference by Federal law enforcement officers - uniformed police or special agent.

### **THE PURPOSE OF A TERRY STOP**

The purpose of a *Terry* stop is to conduct a brief investigation to confirm or deny that

the suspect is involved in criminal activity.<sup>2</sup> A law enforcement officer may initiate a *Terry* stop when he or she suspects that an individual is committing, has committed, or is about to commit a crime, but probable cause does not yet exist to arrest and the officer wants to "stop" the suspect and investigate. If, during the stop, probable cause to arrest is developed, the suspect will be arrested. If probable cause is not developed, the suspect is released. Lawful *Terry* stops can also be used to develop important criminal intelligence. If officers are documenting their *Terry* stops, a file of persons stopped, their descriptions, names, addresses, locations they frequent, etc., can be compiled. For many years, the New York City Police Department would refer to precinct-level "Stop and Frisk Cards" completed by an officer during *Terry* stops when they were looking for leads on unsolved, major crimes in the area. Often, a victim's general description of an assailant would match that of a suspect stopped three or four times in the recent past in the same general area by precinct cops for suspicion of "pre-robbery" activities. In many cases, these documented *Terry* stops led to photo lineups, fingerprint runs, voluntary contacts, submission to police questioning, etc., that eventually solved the "open" crimes."

### **THE "ROLLING" TERRY STOP**

Law enforcement officers should remember that, just as a person may be subjected to a lawful *Terry* stop while walking down the street, so too can a moving auto be pulled over (forcibly - via use of emergency lights and siren) if valid *reasonable suspicion* exists to support the stop.<sup>3</sup> Both uniformed and plain-clothes personnel can employ this concept.

**Field Example:** A patrol officer on Highway #37 within the city limits of Noblesville,

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<sup>1</sup> *Terry v. Ohio*, 392 U.S. 1 (1968)

<sup>2</sup> *Id.*

<sup>3</sup> *US v. Cortez*, 449 U.S. 411 (1981)

Indiana hears a police radio dispatch broadcast a “be-on-the-lookout (BOLO)” for an “armed robbery / shots fired” - that just fled a shopping mall six miles away. The suspect and vehicle are described as follows:

Perpetrator: Approximately 30 year old white male with blond hair

Armed: Displayed a large silver revolver – shots fired

Vehicle: Fleeing the scene in a white, medium-sized, four-door sedan with Indiana passenger plates starting with the numbers “29”

Direction: Vehicle was last seen traveling north on Highway 37 past Fishers, Indiana heading towards Noblesville, Indiana

Time: Two - four minutes in the past

Victim: One victim shot and likely to die

Witnesses: Several witnesses on the scene.

About two minutes after hearing the radio broadcast, the patrol officer spots a 1994, white, Chrysler Concord four-door sedan driven by what appears to be a white male, approximately 25 – 35 years old. The vehicle is driving Northbound on Highway #37, through the city of Noblesville going the speed limit and committing no moving violations. As the officer pulls up behind the car, he notices it bears Indiana passenger plates “29 N 1109.” The officer calls for backup units and initiates a high-risk felony “Rolling *Terry* Stop” on the suspect vehicle. The driver stops without incident and the officer cautiously approaches. The officer directs the driver out of the vehicle and immediately

performs a frisk. A stainless steel .357 caliber, four-inch revolver with full “lug” barrel is found in the driver’s waistband. The suspect is secured and asked if he has a permit for the concealed weapon (required in Indiana). In response, the suspect says, “Yes, but it’s at home.” A check of the State Police handgun permit data-base reveals no such permit. The suspect is arrested and later identified as the gunman.

Variation A: After the stop, the driver fully cooperates, no gun is found during the frisk, but, while the officers are checking the driver’s license and registration, a witness is driven approximately 8 miles to where the car has been stopped and identifies the driver as the gunman. The suspect is then arrested.

Analysis: In this case, the officers did not have probable cause to arrest the suspect when the vehicle was spotted and could not even be certain the driver was involved due to the general nature of the description. While probable cause to arrest did not exist, “reasonable suspicion” (see the following sections for a detailed definition) that the driver may have been involved in the recent armed robbery, due to the time, location, direction of travel, proximity to crime and matching of the general description. Once lawful “reasonable suspicion” is established, the *Terry* stop may be executed on a moving vehicle, as well as on a pedestrian.

### THE “STOP”

1. Defined. A *Terry* stop is defined as “a brief, temporary involuntary detention of a person suspected of being involved in criminal activity for the purpose of investigating the potential criminal violation.”<sup>4</sup> In order to

<sup>4</sup> *Terry*, 392 U.S. at 30 (“...an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot ...a

lawfully conduct a Terry stop, a law enforcement officer must have “reasonable suspicion,” which has been defined as “articulable<sup>5</sup> facts that would lead a reasonable officer to conclude that criminal activity is afoot. More than an unsupported hunch but less than probable cause and even less than a preponderance of the evidence.”<sup>6</sup>

2. Levels of Suspicion. To help understand just what “reasonable suspicion” is, it may be helpful to review other standards of proof that most impact a law enforcement officer.

a. **Mere Suspicion:** A “gut” hunch that criminal activity is afoot. There are no “facts” a law enforcement officer can use to explain or justify his or her “feeling.” This standard will legally justify a voluntary stop only.<sup>7</sup>

b. **Reasonable Suspicion:** See Section 1, above.

c. **Probable Cause:** Probable cause means reasonable grounds to believe that a crime has been committed and that a particular suspect has committed it. This level of suspicion will justify an arrest (either a field arrest or an arrest via a warrant).

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police officer may in appropriate circumstances and in an appropriate manner approach a person for the purpose of investigating possible criminal behavior even though there is no probable cause to make an arrest.”)

<sup>5</sup> *Articulable* means able to explain in words.

<sup>6</sup> *U.S. v. Sokolow*, 490 U.S. 1 (1989)

<sup>7</sup> Also known as the *Common Law Right of Inquiry*. Permits an officer or agent to engage any citizen in a purely voluntary conversation (i.e. “May I speak with you a moment? Do you need any help? How long have you been here?”). In these cases, a citizen must be free to terminate the conversation at any time and go his or her way with no restrictions.

d. **Proof Beyond a Reasonable Doubt:** This is the level of suspicion required for a criminal conviction. This phrase is described differently by different courts. One common reference regarding proof beyond a reasonable doubt is “to a moral certainty.”

3. Factors Supporting Reasonable Suspicion to Conduct a Terry Stop. In order to support a *Terry* stop based upon reasonable suspicion, courts have looked at a number of different factors. Some of those factors are listed below. Often, more than one factor must be present to justify a stop, but this is not always the case.

a. **Hour of the Day:** Actions that are unusual for the hour of the day may indicate possible criminal activity, and can be used to support a *Terry* stop.

**Field Example:** Law enforcement officers observe a van loading and unloading furniture and equipment out of a restaurant at 3:30 a.m., a time when the restaurant is normally closed. Possible Crime - Burglary.

b. **Unusual Presence:** Presence in a location that is unusual for the time of day may indicate possible criminal activity.

**Field Example:** A person that a patrol officer does not recognize is seen in a government employee parking lot at 4:30 a.m., when the building is closed to the public and no night shifts are on-duty (other than police and maintenance). Possible Crime - Theft From An Auto.

c. **High Crime Area:** If an area has a documented history of being located in a “high crime area,” what might otherwise be considered “innocent conduct” may form the basis for reasonable suspicion to stop and investigate.

**Field Example:** In an area known for illegal drugs sales (over 60 illegal drug sale arrests over the last three months), a law enforcement officer observes a person standing on a corner approach three different cars that drive up, stop, and exchange what appears to be currency for small plastic bags within a fifteen minute period. Possible Crime - Illegal Sale of Drugs.

d. **Unusual Dress:** Dress or apparel that is unusual for the area or weather can be indicative of possible criminal activity.

**Field Example:** It's August, the temperature is 96 degrees Fahrenheit, with a humidity factor of over 90 percent. A uniformed Federal police officer observes a person walk in to a Federal building wearing the following: A full-length, thick, down parka and a military "web gear" type belt, with a canteen / canteen cover, first aid pouch, what appear to be ammunition magazine carriers and a bayonet sheath without the bayonet in place, plus a World War II era German Army helmet on his head. Possible Crime - Possession of a Weapon.

e. **Unusual Actions:** Actions that are unusual and suspicious may indicate possible criminal activity and can be used as a factor to justify a *Terry* stop.

**Field Example:** A person walks into a Federal Building and begins to scream at everyone who walks by, "Leave me alone! Don't take me away! Don't shoot me!" Possible Crime - Disorderly Conduct.

f. **Smell:** When a law enforcement officer detects odors that may indicate criminal activity, a *Terry* stop may be justified.

**Field Example:** An officer talking to a motorist who requested directions smells what he or she thinks is marijuana emanating from the inside of the vehicle. Possible Crime - Possession of Marijuana.

g. **Sounds:** Sounds that are unusual and indicate possible criminal activity.

**Field Example:** While walking past a full-sized van parked next to a large Federal building, a uniformed officer hears what she thinks is the sound of a semi-automatic rifle being charged (the slide being pulled back and released to load the weapon and prepare to fire). Possible Crime - Assault on Federal Employee / Possession of an Illegal Weapon

h. **Information from Witnesses:** Credible information from reliable witnesses that a crime may be in progress.

**Field Example:** A Federal employee the officer / agent knows and a person the officer / agent does not know stop the law enforcement officer in a Federal building and point out a person waiting for the elevator and explain he just displayed a silver handgun and shouted: "Now I'll show them."

Possible Crime – Illegal Possession of a Weapon / Assault on Federal Employee

i. **Personal Knowledge of a Suspect:** Information an officer / agent has acquired from personal contact in the past with a suspect indicating criminal activity may support a "stop."

**Field Example:** An officer / agent has arrested a suspect three times in the past two years for disorderly conduct in a Federal building. Each time, the suspect has been armed with a twelve-inch bayonet in violation of Federal law. The officer / agent sees the person walk toward the officer / agent in a

peaceful manner while both are inside a federal building.

Possible Crime – Illegal Possession of a Weapon

j. **Statements by a Suspect:** Things that a suspect says may support a stop if it indicates criminal activity.

**Field Example:** During a car stop (or voluntary contact) with a citizen, within the jurisdiction of Washington D.C. (where it is rare for a citizen to have a valid concealed handgun permit), the citizen says to the officer / agent : “*Hey, I bet my 9 millimeter is bigger than yours!*”

Possible Crime – Illegal Possession of a Weapon / Assault on a Federal Employee

**Duration of the Stop:** A suspect may be detained in connection with a *Terry* stop for as long a period as is “reasonable” to conduct a diligent field investigation. If a suspect is detained too long without obtaining probable cause to arrest, a possible civil judgment for unlawful detention is possible. This issue will be decided on a case-by-case review. A common “field rule” used by many law enforcement agencies across the nation is the “20 minute rule.”<sup>8</sup> However, officers must understand that, depending on the facts and circumstances of each case, twenty minutes may be found to be excessive, while twelve hours may be deemed reasonable.<sup>9</sup> One factor impacting

on the lawful duration of a *Terry* stop is any delay caused by the actions of the suspect, such as lying to an officer who is attempting to corroborate a suspicious story (e.g., when a suspect claims to have borrowed the car from a relative, but cannot provide a complete name or address of the relative). However, delays caused solely by police conduct (such as waiting 90 minutes for a drug detection dog to arrive from across town for a “walk by”) are usually held against the police and will not justify delaying a suspect on a *Terry* stop<sup>10</sup>.

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<sup>8</sup> Many police agencies have adopted an informal “20 minute rule” on *Terry* stops. Under the 20-minute rule, if after conducting a *Terry* stop, probable cause to arrest is not developed within twenty minutes, the suspect is released.

<sup>9</sup> *United States v. Hernandez*, 473 U.S. 531 (1985)(the Supreme Court held that reasonable suspicion existed that the suspect had ingested drugs and that detaining the suspect 12 hours until

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the suspected drugs were “passed” was reasonable under the circumstances, since the suspect refused to cooperate in any way.)

<sup>10</sup> *United States v. Place*, 462 U.S. 696 (1983)