MUNICIPAL LIABILITY NEWSLETTER

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Terry v. Ohio Review and Recommendations

Contents:

This article focuses on investigative stops set forth in *Terry v. Ohio*. While most of our readers may be familiar with the case, we believe it is important enough to revisit from time to time. The following provides a summary of the case and subsequent case law, compares *Terry* stops with custodial arrests, and concludes with recommendations for evaluating a police stop in light of *Terry*.

A. Case law

Typically, encounters between police and citizens are divided into three categories: (1) the consensual encounter, which may be initiated without any objective level of suspicion, (2) the investigative detention, which, if non-consensual, must be supported by a reasonable, articulable suspicion of criminal activity, and (3) the arrest, valid only if supported by probable cause. *United States v. Avery*, 137 F.3d 343 (6th Cir. 1997).

Investigative detentions and arrests are considered "seizures" and thus must be conducted consistent with the Fourth Amendment. A "seizure" occurs when "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1989). The consensual encounter, however, is not a seizure as long as the officer's actions do not convert it into an investigative detention, i.e., as long as the individual is free to leave. *Id*.

> ***Did you know?***
> The first *Terry* stop was performed by a City of Cleveland police officer when he stopped and frisked suspects who were "casing a job" in front of a downtown store just west of Gallagher Sharp.

The standard for investigatory detentions was set forth in *Terry v. Ohio*, 392 U.S. 1 (1968), where the United States Supreme Court held that an officer may conduct an investigatory stop without probable cause where the 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…." *Id.* 30. "However, to justify a *Terry* stop, an 'inchoate and unparticularized suspicion or hunch' is not sufficient." *United States v. Smith*, 594 F.3d 530, 536 (6th Cir. 2010) (quoting *Terry*, 392 U.S. at 27). The officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21.

[1]An officer has probable cause when at that moment the facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information was sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense. *Amine v. King*, 2011 U.S. Dist. LEXIS 107424 (E.D. Mich. Sept. 21, 2011).

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Two Key Questions for a Terry Stop

1. Is there reasonable suspicion supported by articulable facts that criminal activity is afoot?
2. Does the detention last no longer than necessary to effectuate the purpose of the seizure?

A *Terry* stop is proper if: (1) an officer's action was justified at its inception, and (2) the action was reasonably related in scope to the circumstances which justified the interference in the first place. *United States v. Perez*, 440 F.3d 363, 369-70 (6th Cir. 2006) (quoting *Terry*, 392 U.S. at 20). The first *Terry* requirement is satisfied where there is "reasonable suspicion supported by articulable facts that criminal activity may be afoot." *Id*. at 370 (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)). The second *Terry* requirement is met if the detention lasts no longer than necessary to effectuate the purpose of the seizure. *Id*. at 372. On the other hand, "[w]hen police actions go beyond checking out the suspicious circumstances that led to the original [*Terry*] stop, the detention becomes an arrest that must be supported by probable cause." *Smoak v. Hall*, 460 F.3d 768, 780-81 (6th Cir. 2006) (citation and quotation marks omitted). In determining whether this line has been crossed, we consider "the length of the detention, the manner in which it is conducted, and the degree of force used."

Flight from police is a factor that can be used in evaluating whether there was cause for a *Terry* stop. *United States v. Caruthers*, 458 F.3d 459, 466 (6th Cir. 2006) (citing *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

B. Investigative stop v. custodial arrest

The line between a *Terry* investigative stop and full, custodial arrest is not always readily apparent. In the former, the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions of criminal activity. Unless the encounter provides the officer with probable cause to arrest, the suspect must then be released. *United States v. Swanson*, 341 F.3d 524 (6th Cir. 2003). In a *Terry* stop a detainee is not free to leave during the investigation, yet is not entitled to *Miranda* rights. *Id*.

In determining whether a suspect is under custodial arrest, courts consider the totality of the circumstances to determine "how a reasonable man in the suspect's position would have understood the situation." Courts also look to the following four elements of an arrest: (1) an intent to arrest; (2) under real or pretended authority; (3) accompanied by an actual or constructive seizure or detention of the person; and (4) which is so understood by the person arrested. *State v. Darrah*, 64 Ohio St.2d 22, 26, 412 N.E.2d 1328 (1980). Note that the first and fourth elements distinguish an arrest from a *Terry* stop. Specifically, a *Terry* stop does not involve an intent to arrest, and the detainee should understand he or she is detained, not arrested.

In examining whether the encounter is an arrest or investigative stop, courts consider the following:

> (1) the purpose of the questioning; (2) whether the place of the questioning was hostile or coercive; (3) the length of the questioning; and (4) other indicia of custody such as whether the

> suspect was informed at the time that the questioning was voluntary or that the suspect was free to leave or to request the officers to do so; whether the suspect possessed unrestrained freedom of movement during questioning; and whether the suspect initiated contact with the police . . . [or] acquiesced to their requests to answer some questions.

Swanson, 341 F.3d at 529.

C. Analysis and recommendations

We recommend considering *Terry* when the validity of an encounter between a police officer and a private citizen has been challenged. As noted above, an arrest requires probable cause, a bar that may not be met by an officer on the street who does not witness a criminal offense but does observe strange or potentially dangerous behavior. Often a *Terry* stop will provide grounds for the subsequent arrest when the officer observes something that provides probable cause during the stop. For example in the *Terry* case itself, the Cleveland police officer felt guns in the pockets of John Terry and Richard Chilton when he patted them down, which justified their arrests for carrying concealed weapons.

In all cases, the focus should be on what the officer was thinking, seeing, and doing at every moment.

One thing to keep in mind is that an initial encounter that was consensual does not require probable cause or reasonable suspicion. An officer may walk up and talk to any individual as long as the individual is free to leave, may refuse to answer any questions, and may decline to identify him or herself. If an officer observes suspicious activity during a consensual encounter, however, the encounter may justify a *Terry* stop.

In analyzing police encounters with citizens, the following inquiries may be appropriate:

1. Was the initial encounter consensual, i.e., was the individual free to leave?
2. If so, did the officer observe anything during that consensual encounter that could justify a *Terry* stop?
3. If the initial encounter was not consensual, was there "reasonable suspicion" supported by articulable facts that criminal activity was afoot before the stop?
4. Once the *Terry* stop was initiated did it last no longer than necessary to effectuate the purpose of the stop?
5. If a *Terry* stop was made, did the detainee understand that he was not under arrest? An explicit statement by the officer to the person that he or she is detained – not arrested – may be helpful.
6. Did the officer observe anything during the stop that could support the probable cause for a custodial arrest?

Recent Case Law

Pretrial detainee excessive force claim subject to Fourteenth Amendment standard.

In *Coley v. Lucas Cty.*, 799 F.3d 530 (6th Cir. 2015), Benton, a pretrial detainee, was taken to the hospital for seizure treatment. After his treatment Lucas County employees tried to disengage Benton from the restraints that bound him to the hospital bed. When he resisted, the employees beat him, loaded him into a van, and drove him back to jail. The complaint alleged that Officer Schmeltz, still angry from the altercation, shoved and struck Benton while walking him through booking. Benton fell and struck his head on the concrete floor. Officer Schmeltz, aided by others, was able to get Benton to the medical ward where Benton struggled but did not pose a threat to anyone. Officer Gray then applied a chokehold that killed Benton. The officers failed to inform medical staff that Benton was unconscious, and falsified official reports chronicling the incident. The FBI opened an investigation years later and uncovered the officers' misconduct, which resulted in jail terms.

In the resulting civil suit, the district court denied the officers' motions to dismiss the excessive force claims. The officers appealed and argued that the court employed the wrong standard in ruling on their motions.

The Sixth Circuit cited a recent Supreme Court case, *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), which held that excessive force claims brought by pretrial detainees are subject to the Fourteenth Amendment, not the Fourth Amendment. The plaintiff under the Fourteenth Amendment must show "that the force purposely or knowingly used against him was objectively unreasonable." Because the Sixth Circuit found that the force used against Benton met this standard, it affirmed the trial court. To view the opinion please click *Coley v. Lucas Cty.*, 799 F.3d 530 (6th Cir. 2015).

There is no reasonable expectation of privacy for an inadvertent call.

In *Huff v. Spaw*, 794 F.3d 543 (6th Cir. 2015), Carol Spaw, assistant to the CEO of Cincinnati/Northern Kentucky International Airport, received a call from James Huff, chairman of the airport board. Spaw realized that she received a pocket dial and that the background conversation was not intended for her ears. However, Spaw stayed on the line and began taking notes and recording audio as Huff discussed private business matters with another board member, and later with his wife. Spaw shared the recording with other board members. Huff and his wife sued Spaw for intentionally intercepting their private conversation in violation of Title III of the Omnibus Crime Control and Safe Street Act of 1968. The district court granted summary judgment in favor of Spaw.

On appeal, the Sixth Circuit affirmed in part, reversed in part, and remanded. The Sixth Circuit found that Title III only protects communications when the expectation of privacy is objectively reasonable (a similar standard applicable to law enforcement). The court found that Huff did not have a reasonable expectation that his conversation was private – while he did not deliberately dial the call, he knew that pocket dials were possible, and did not take any precautions to prevent them.

The court compared Huff's situation to a homeowner who fails to cover his windows with drapes. Under the plain view doctrine, the homeowner has no expectation of privacy in his home when the windows are uncovered. Similarly, Huff could have easily utilized protective settings on his phone to prevent pocket dials. Thus, the grant of summary judgment on the husband's claim was affirmed.

As to the wife's claim, however, the Sixth Circuit reversed. The court reasoned that she had a reasonable expectation of privacy for conversations in a hotel room and concluded that she was not responsible for her husband's pocket dial.

Court dismisses failure to warn claim against Taser manufacturer.

In *Mitchell v City of Warren*, 2015 Fed App 0203P (6th Cir, Aug 21, 2015), Plaintiff, whose son died after being shot with a Taser, brought failure to warn and negligence claims against the manufacturer. Under Mich. Comp. Laws § 600.2948(3), any liability for failure to warn in required a showing that the manufacturer knew or should have known about the risk of cardiac arrest from a Taser chest shot based on the information available at the time of sale.

The majority engaged in a lengthy review of history of the devices, and then discussed literature related to the potential risk of cardiac episodes as a result of being Tased in the chest. The court ultimately found that generic knowledge of risk is not sufficient to show that the manufacturer knew or should have known its product "posed the *particular* risk at issue in case," and affirmed summary judgment. The court found plaintiff's claims inadequate because plaintiff did not establish anything more than a possibility that the particular harm would occur: "We have refused to rely on studies establishing that the product can *possibly* cause an injury to prove that a product *probably* caused the injury." The court also dismissed the negligence claim. To view the opinion, please click *Mitchell v City of Warren*, 2015 Fed App 0203P (6th Cir, Aug 21, 2015).

Although the case is based on Michigan law, many other states have similar product liability standards. Accordingly, this case can be used as precedent outside of Michigan and the Sixth Circuit to support the dismissal of claims against the manufacturers of Tasers as well as the agencies that use them.

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