DOES PUBLIC FIREARMS POSSESSION JUSTIFY A TERRY STOP?

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Questions often arise as to whether the mere possession of a firearm in public, absent some other illegal conduct, legally justifies a brief investigatory detention or *Terry* Stop. This is not an easy question to answer because each state is free to interpret their firearms possession and firearms permit laws as they wish. Typically, if a state views a firearms permit as an affirmative defense to the state statute that prohibits unlawful possession of a firearm or concealed weapons, then the fact that a person possesses a firearm in public is likely to amount to sufficient reasonable suspicion to justify a brief investigatory detention to determine if the person possesses a firearms permit. On the other hand, if a state views the absence of a permit as an element of the crime of unlawful possession of a firearm or concealed weapon, then questions arise as to whether mere possession of a firearm, without some other articulable manifestations of criminal conduct, will justify an investigatory detention.

Recently, the Eleventh Circuit Court of Appeals decided the *United States v. Montague*[i], which illustrates the principals above. In this case, officers in Florida received information from a local security guard (who was known to provide reliable information) that Montague was carrying a concealed firearm. The officers located Montague and conducted a *Terry* stop and frisk based on the security guards information. They located a firearm and ammunition.

Montague was arrested and ultimately charged with firearms violations under federal law. He filed a motion to suppress the gun and ammunition and argued that mere possession of a firearm in public did not provide the officers with sufficient reasonable suspicion to justify a *Terry* stop because it was legal to carry such a weapon with a permit and the officers did not know if he possessed a permit prior to detaining and frisking him. The district court denied the motion to suppress and Montague was convicted. He appealed to the Eleventh Circuit Court of Appeals.

The issue before the court of appeals was whether the *Terry* stop and frisk of Montague was reasonable under the *Fourth Amendment*, in light of Florida's firearms possession laws.

The court of appeals first noted several rules that apply to this case. First, they noted

> The *Fourth Amendment*, however, does not prohibit a police officer from seizing a suspect for a brief, investigatory stop where the officer has a reasonable suspicion that the suspect was involved in, or is about to be involved in, criminal activity.[ii]

Second, the court clarified that

> [R]easonable suspicion is a less demanding standard than probable cause, but requires at least a minimal level of objective justification for making the stop in light of the totality of the circumstances.[iii] [internal quotations omitted]

Lastly, the court stated

> In connection with a *Terry* stop, a police officer who has reason to believe that he is dealing with an armed and dangerous individual may also conduct a reasonable search for weapons in support of his own protection and that of others, even if he is not absolutely certain that the individual is armed. An officer may conduct a *Terry* pat-down search for weapons on a suspect's person if the requisite reasonable suspicion is present, and that search may continue when an officer feels a concealed object that he reasonably believes may be a weapon.[iv] [Internal citations omitted]

Thus, when considering the above rules, the court must resolve whether the officers initially had sufficient reasonable suspicion of criminal activity, particularly the State of Florida's concealed weapon statute, to justify the initial *Terry* stop and frisk. The court of appeals noted that Florida's concealed weapons statute states

> A person who carries a concealed firearm on or about his or her person commits a felony of the third degree.[v]

However, this same statute, in subsection (3) provides that the prohibition above does not apply "to a person licensed to carry…a concealed firearm pursuant to the provision of section 790.06."[vi] Section 790.06 provides that the concealed firearm permit must be carried at all times while carrying a concealed firearm and the permit must be displayed upon the demand of a law enforcement officer.

The court of appeals then looked at how the Florida appellate courts interpret the above statutes. Montague cited *Regalado v. State*[vii], a Florida Fourth District Court of Appeals case. *Regalado* held

> Because it is legal to carry a concealed weapon in Florida, if one has a permit to do so, and no information of suspicious criminal activity was provided to the officer other than appellant's possession of a gun, the mere possession of a weapon, without more, cannot justify a *Terry* stop.[viii]

The prosecution cited first to the *State v. Navarro*[ix] and stated

> The en banc Florida Third District Court of Appeal, while not explicitly addressing the possibility of a concealed weapons permit, found that probable cause existed to pat down and search a defendant where the officer observed the bulge of what appeared to be a concealed firearm protruding from the defendant's jacket. The court adopted the dissenting opinion from the panel

> decision, holding that the "officers' observation of the outline of a firearm amounted to probable cause to believe that [the defendant] was carrying a concealed weapon…[x]

Further, the Eleventh Circuit noted that, in *State v. Burgos*[xi], the Florida Fifth District Court of Appeal held

> [T]hat a suspect's admission that he was carrying a weapon supported a reasonable suspicion that he was committing a crime because [a]lthough some citizens do have the right to carry concealed firearms lawfully, the vast majority do not.[xii] [internal quotations omitted]

After the Eleventh Circuit Court of Appeals examined the above cases from the Florida Third, Fourth, and Fifth District Courts of Appeal, they noted that the incident in *Montague* took place in the Third District. Further, in Florida,

> [I]n the absence of interdistrict conflict, district court decisions bind all Florida trial courts" unless and until they are overruled by the Florida Supreme Court. [I]f the district court of the district in which the trial court is located has decided the issue, the trial court is bound to follow it. Contrarily, as between District Courts of Appeal, a sister district's opinion is merely persuasive.[xiii]

Thus, since the incident in Montague took place in the Third District, the Eleventh Circuit must follow the precedent from that District. The other cases are considered "persuasive" but are not binding on the Third District.

As such, the Eleventh Circuit Court of Appeals held

> Under the facts of this case, the officers did not need to ascertain whether Montague had a permit before they conducted a *Terry* stop and search because they had reasonable suspicion that he was carrying a concealed weapon based on a reliable informant's tip that Montague was carrying a gun.[xiv]

NOTE: Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal advisor regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.

CITATIONS:

[i] No. 10-15693, 2011 U.S. App. LEXIS 16983 (11th Cir. Decided August 15, 2011 Unpub.)
[ii] *Id*. at 2-3 (citing *Terry v. Ohio*, 392 U.S. 1 (1968))
[iii] *Id*. at 3 (quoting State v. Jordan, 635 F.3d 1181, 1186 (11th Cir. 2011))
[iv] *Id*. (citing *Terry*, 392 U.S. at 27; *United States v. Clay*, 483 F.3d 739, 743-44 (11th Cir. 2007))
[v] *Id.* at 4 (quoting *Fla. Stat. § 790.01 (2) (2006*))
[vi] *Id*. (quoting *Fla. Stat. § 790.01 (3) (2006))*
[vii] 25 So. 3d 600 (Fla. 4th DCA 2009)
[viii] *Id*. at 5 (citing Regalado, 25 So.3d at 601)
[ix] 464 So.2d 137, 139-40 (Fla. 3rd DCA 1985)
[x] *Id.* at 5-6 (citing *Navarro*, 464 So.2d at 139)(see also fn 3 – "The wording of *Fla. Stat. § 790.01* was different at the time Navarro was decided, but, like the current statute, it provided that a person carrying a concealed firearm was guilty of a felony in the third degree and separately stated that this provision did not apply to individuals with a license to carry concealed firearms.")

[xi] 994 So.2d 1212 (Fla. 5th DCA 2008)
[xii] *Id.* at 6 (citing *Burgos*, 994 So.2d at 1214)
[xiii] *Id*. at 6-7 (quoting *Pardo v. State*, 596 So.2d 665, 666 (Fla. 1992))
[xiv] *Id.* at 7