TERRY STOPS, FRISKS, AND DUFFEL BAGS

January 2011

Article Source: http://www.llrmi.com/articles/legal_update/2011_6th_walker.shtml
Printable Version: http://www.patc.com/weeklyarticles/print/2011_6th_walker.pdf

©2011 Brian S. Batterton, Attorney, Legal & Liability Risk Management Institute (llrmi.com), United States v. Walker, (6th Cir. Decided August 12. 2010)

In 1968, in *Terry v. Ohio*[i], the United States Supreme Court held that officers may conduct a brief investigative detention of a person based upon a "reasonable suspicion" standard as opposed to the "probable cause" standard required for arrest. Further, the court also held that officers may conduct a frisk or limited search of a person's outer clothing for weapons when the officer has a reasonable belief that the detained suspect is armed and dangerous. Specifically, in Terry, the Supreme Court stated

> 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, ...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.[ii]

Thus, Terry specifically dealt with frisks of persons. Officers often encounter suspects that are carrying baggage such as duffel bags, backpacks and purses. When officers have a reasonable belief that a suspect that they have lawfully detained in armed and dangerous, they must apply the rule from Terry to the suspects carried baggage, which presents the question: **Can the officer search (limited in scope to only places a weapon to could be hidden) the baggage or is the officer limited to "frisking" the outer surface of the bag or simply removing the baggage from the suspect's reach during the detention?** On August 12, 2010, the Sixth Circuit Court of Appeals decided the *United States v. Walker*[iii], which specifically answered the above question.

The relevant facts of *Walker* are as follows:

> On December 5, 2005, Special Agent Michael Kelly of the FBI arrived at the scene of a bank robbery at the National City Bank in Sciotoville, Ohio. The bank's tellers told him

that the thief had stolen $ 9,609 and gave a description of the perpetrator: a white male, between five foot eight and six feet and between 160 and 180 pounds, who wore dark clothing, gloves and a plastic or rubber skeleton mask with a hood, and who was armed with a semi-automatic silver pistol. Other witnesses identified the get-away vehicle as a blue Plymouth Voyager with wood-grain panels, and one witness provided a full license plate number. Local authorities put out a BOLO (Be On the Lookout) for the car and thief.

Among the officers in the area who received the BOLO was Officer Lee Bower of the Portsmouth Police Department, located about twenty minutes from the bank. Soon after receiving the bulletin, and twenty-seven minutes after the robbery, Officer Bower spotted a blue van with wood-panel siding parked outside of Pollock's Body Shop. He called dispatch to confirm the license plate number. It was a match. Officer Bower called for backup and drove into the body shop parking lot.

From his cruiser, Officer Bower watched Charles Burke cross the parking lot and head toward the van. The officer exited the car and approached Burke, then noticed Defendant Clint Walker, whom he knew as the owner of T & T Garage, walking toward him with a black duffel bag slung over his shoulder. Officer Bower asked Walker whether he was the one driving the van. He was. The officer asked him for identification. In response, Walker walked to the other side of the van. When Officer Bower followed and told him to stop, Walker explained, "Well, it's right here in my bag," and he unzipped the duffel bag part way. Officer Bower grabbed the bag, placed it on the ground and escorted Walker about eight feet away to the front of the police cruiser. The officer frisked Walker for weapons.

Backup arrived. Bower told Officer Steven Timberlake to pat Burke down, which he did. Burke provided Officer Timberlake with identification, but Walker renewed his insistence that his identification was in his wallet, which was in his bag. The officers told him that they would retrieve the wallet from the bag, but Walker responded, "I'd rather not let you get in the bag" because "I have some personal things in there." Officer Timberlake placed the bag on the hood of one of the police cruisers and pulled the zipper open further.

With the bag unzipped further, both officers noticed a skeleton mask lying on top. The officers handcuffed Walker and Burke and read them their Miranda rights. "Where's the gun?" Officer Bower asked, and Walker told him it was in the bag. "Where's the money?" Officer Bower asked, and Walker looked away, declining to answer. Id. Based on the information gathered during this exchange and the information they already had, the police obtained a warrant to search the rest of Walker's bag, where (in addition to the mask) they found dark clothing, the money from the bank and a .22 caliber Jennings chrome firearm.[iv] [internal citations omitted]

Walker was indicted for numerous federal crimes related to this armed bank robbery, as well as other bank robberies, by a federal grand jury. He filed a motion to suppress the search of his duffel bag arguing that the officers violated the *Fourth Amendment* when they unzipped his bag and observed

the skeleton mask. The district court denied the motion and Walker entered a plea to several charges with the right to appeal the denial of his motion to suppress.

Walker appealed the denial of his motion to suppress to the Sixth Circuit Court of Appeals. Walker argued two issues under the *Fourth Amendment* which are as follows:

1. Whether it was reasonable under the *Fourth Amendment* for the officers unzip his bag and look into the bag in order to ascertain whether it contained a weapon.
2. Whether it was reasonable under the *Fourth Amendment* to conduct any frisk or search of the bag since the officer separated him from his bag and it was not within his reach?

As to the first issue of whether officers acted reasonable under the *Fourth Amendment* by unzipping and looking into Walker's duffel bag, the Sixth Circuit first noted several rules regarding searches and frisks. The rules are as follows:

- A search…is not unreasonable merely because officers did not use the "least intrusive" means.[v]
- [T]he concern for officer safety extends not only to a suspect himself but to "the area surrounding a suspect" where he might "gain immediate control of weapons."[vi]
- The directive to steer clear of "unreasonable" searches cannot be reduced to a "frisk first" or any other one-size-fits-all command, which is presumably why courts of appeals have declined to adopt a "frisk first" requirement for Terry searches.... The courts' job is to ask what was reasonable under the circumstances, not to poke and prod for lesser-included options that might not occur to even the most reasonable and seasoned officer in the immediacy of a dangerous encounter.[vii]

The Sixth Circuit then applied the facts of *Walker* to rules above. The relevant facts were as follows: (1) a witness provided a vehicle description and tag number of the get-away vehicle and an officer located a vehicle that met the description that was displaying exact tag reported by the witness; (2) the officer then detained two white males that were walking to that vehicle; (3) Walker stated that he was the driver of the vehicle that met the description and tag number of the get-away vehicle; (4) witnesses reported that the robbery suspect was armed with a handgun; and (5) at the officers request for identification, the Walker stated that it was in his duffel bag and he began to unzip the bag. In light of the above facts, the court stated that "the officers had a perfectly reasonable apprehension that Walker had a weapon in the duffel bag he was carrying."[viii] The Sixth Circuit then stated

> Unzipping the bag more than it was already unzipped was "an efficient and expedient way" to determine whether a gun lay on the top of the bag, ready for use. After unzipping the bag and looking inside, the officers conducted no further search of the bag until they had a warrant. On this record, it is fair to say that the search was reasonably designed to discover weapons that might pose a threat to the officers' safety, namely weapons lying on the top of the already partially unzipped duffel bag. As in Terry, the sequence of events reflects the "tempered act" of a police officer who in the midst of an encounter with an armed suspected bank robber "took limited" and reasonable "steps" to protect himself and his fellow officer. Outside the scope of the warrant requirement, the Fourth Amendment demands neither best practices nor

> formulaic adherence to one search method over another--just that the "searches and seizures" not be "unreasonable." This modest search into the top of the bag was reasonable.[ix] [internal citations omitted]

Thus, the court upheld the limited search of the duffel bag as reasonable under the *Fourth Amendment* as intended to discover weapons and it was limited in scope.

As to Walkers second issue of whether any frisk of the bag was permitted since the officers removed it from his reach, the Sixth Circuit first noted that Walker waived his right appeal this issue because he had already stipulated that the circumstances of the incident gave rise to a reasonable belief that he was armed and dangerous. However, the court addressed the issue anyway.

Walker based his argument on the rationale of *Arizona v. Gant*[x], a United States Supreme Court case that limited officers ability to conduct a search of a vehicle incident to arrest to limited circumstances when the suspect is handcuffed and seated in the back seat of a police car. The Sixth Circuit then distinguished Walker's case from the *Gant* case. First, in Gant, Gant was handcuffed and locked in the back of a police car at the time of the search. In this case, neither Walker nor the other suspect was handcuffed or locked in a police car. In fact, Walker was approximately eight feet away from his bag and the other suspect was only approximately three feet from the bag. Additionally, the there were two officers and two suspect in Walker's case; in *Gant,* the officers outnumbered the suspects. As such, in *Walker*, the Sixth Circuit found that the possibility of access to the bag by one of the suspects was not remote.[xi]

The Sixth Circuit also looked at what other alternatives the officers had in Walker's case. Clearly, initially the officers did not have probable cause to arrest the suspects at the time the search of the bag was conducted. As such, the court reasoned that the only other two options before the officers, other than to search the bag as they did, were (1) to arrest the suspects without probable cause and search the bag incident to the [unlawful] arrest (clearly a bad option), or (2) return the suspect's bag to them unchecked and release them. In response to these two options, the Sixth Circuit stated

> Faced with these kinds of split-second judgments, police officers, it is clear, have a much more difficult job than we judges, who may take several weeks (if not months) to resolve these kinds of issues. That is why we do not "require that police officers take unnecessary risks in the performance of their duties." Where, as here, the only alternative is to give a suspect access to a potential weapon (in an un-searched bag), a Terry search for weapons is justified--and reasonable.[xii] [internal citations omitted]

Thus, the court held that the officers acted reasonably in conducting the limited search of Walker's duffel bag and affirmed the denial of the motion to suppress.

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.

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CITATIONS:

[i] 392 U.S. 1 (1968)
[ii] *Id.* at 30
[iii] Nos. 08-4680/4682, 2010 U.S. LEXIS 16684 (6th Cir. Decided August 12. 2010)
[iv] *Id.* at 2-5
[v] *Id.* at 7 (citing City of Ontario v. Quon, 130 S. Ct. 2619, 2632 (2010))
[vi] *Id.* (quoting Michigan v. Long, 463 U.S. 1032, 1049, (1983))
[vii] *Id.* at 9-10 (see *United States v. Shranklen*, 315 F.3d 959, 963-64 (8th Cir. 2003); *United States v. Thomson*, 354 F.3d 1197, 1200-01 (10th Cir. 2003); *United States v. Rhind*, 289 F.3d 690, 693-94 (11th Cir. 2002); *United States v. Brown*, 133 F.3d 993, 998-99 (7th Cir. 1998). Other courts likewise have recognized that non-frisk search methods may be reasonable under the Fourth Amendment. See, e.g., *United States v. Landry*, 903 F.2d 334, 337 (5th Cir. 1990) (grabbing a bag and looking inside); *People v. Jackson*, 79 N.Y.2d 907, 590 N.E.2d 240, 241, 581 N.Y.S.2d 655 (N.Y. 1992) (shining a flashlight through a plastic bag).)
[viii] *Id.* at 7
[ix] *Id.* at 7-8
[x] 129 S. Ct. 1710 (2009)
[xi] *Id.* at 13
[xii] *Id.* at 14