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CopLaw Update

June 5, 2010

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TERRY KEITH EPPS, JR.
v.
STATE OF MARYLAND
May 28, 2010
Epps v. State, 2010 Md. App. LEXIS 90 (May 28, 2010):

The appellant was ultimately asked to lift his shirt and, as he did, Deputy Moro observed "a small, clear plastic baggie to be protruding from the top of his pants."... still seated in the car as this took place... the limited purpose of determining whether the evidence seized as a result of the search should have been suppressed in light of" Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007)...which states that ***"a traffic stop subjects a passenger, as well as the driver, to Fourth Amendment seizure."***

Is the individual totally free of any official restraint, as in a ***true mere accosting situation***, so that the Fourth Amendment is completely inapplicable? Or is he subject to some official restraint (a Terry stop or an arrest)?

In assessing voluntariness, it is necessary to be alert not only to heavy-handed and overtly coercive investigative techniques but also to ***"subtly coercive police questions"*** and to ***"the possibly vulnerable subjective state of the person who consented."***

Green v. State, 145 Md. App. 360, 802 A.2d 1130 (2002) ("A seizure can occur ... by a 'show of authority' coupled with submission to that authority."). ***No case has been cited to us, and we know of none, in which the consent to a request to be frisked has been deemed to be an act of voluntary consent rather than submission to a "show of authority." The very***

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Legal Issues and Use of Force

phrase "consensual frisk" borders on being an oxymoron. The police and prosecutorial "take" on the phenomenon of ***accosting*** is frequently disingenuous. In pure theory, an accosting, if it is more than a convenient fiction, is a ***voluntary conversation between two equals, with neither enjoying any advantage or semblance of control over the other. The officer may no more impose police policy or departmental requirements on a mere accosting than may the civilian impose reciprocal conditions.: "I'm sorry, Officer, but it is my personal policy not to engage in voluntary conversation with armed men. I'll be glad to talk to you, but first you must drop your gunbelt to the ground and then sit down on the curb where I can see your hands at all times.*** Then we can enjoy our talk together." That's not the way, of course, that voluntary conversations work. Between equals, the required civilities flow in both directions, lest the confrontation escalate, as it almost always does, into something more formal and official than a ***mere accosting***.

What an officer does not know cannot be the basis for any suspicion on his part. A proper Terry frisk is limited to a pat-down of the outer clothing "not to discover evidence of a crime, but rather to protect the police officer and bystanders from harm" by checking for weapons. ... Generally, "a pat down is ... a proper, minimally intrusive means of determining whether a suspect is armed." The officer may not exceed the limited scope of a patdown for weapons to search for contraband.

Directing the appellant to lift his shirt went beyond the limited scope of a frisk. It revealed “a small, clear plastic baggie … protruding from the top of his pants.” A pat-down of the appellant would not have permitted the recovery of that baggie. It was not a hard metallic object that could have been mistaken for a weapon. Although, to the touch through clothing, it might have aroused suspicion, it by no means communicated probable cause as per the “plain feel doctrine” of Minnesota v. Dickerson, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993). A properly limited frisk of the appellant would not have produced the cocaine, for the possession of which the appellant is now facing 25 years of imprisonment without the possibility of parole.

The critical limitation is that the intrusion must be only that which is necessary to detect the presence of a weapon -- and

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nothing more. In this case, the alternative intrusion self-evidently detected something other than the presence of a weapon and the appellant is paying a heavy price for that ***incremental revelation***.

Editor's Comment: ***The reader is encouraged to provide this information to their agency's Legal Advisor for clarification and understanding as it relates to their respective Constitutional and Statutory law as filtered through their respective agency Use of Force Policy.***

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