



FOURTH CIRCUIT DISCUSSES 'ARMED AND DANGEROUS' STANDARD FOR A LAWFUL FRISK

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On January 23, 2017, the Fourth Circuit Court of Appeals of decided the *United States v. Robinson*ⁱ, in which the court discussed the meaning of the "armed and dangerous" requirement established by the United States Supreme Court in *Terry v. Ohio*.ⁱⁱ The relevant facts of *Robinson*, taken directly from the case, are as follows:

At about 3:55 p.m. on March 24, 2014, an unidentified man called the Ranson, West Virginia Police Department and told Officer Crystal Tharp that he had just "witnessed a black male in a bluish greenish Toyota Camry load a firearm [and] conceal it in his pocket" while in the parking lot of the 7-Eleven on North Mildred Street. The caller advised Officer Tharp that the Camry was being driven by a white woman and had "just left" the parking lot, traveling south on North Mildred Street.

The 7-Eleven on North Mildred Street is adjacent to the Apple Tree Garden Apartments, and the area constitutes the highest crime area in Ranson. One officer who testified said that in his short one and a half years as a state trooper, he had experience with at least 20 incidents of drug trafficking in the 7-Eleven parking lot. Another officer testified that "when [she] was doing drug work[,] . . . [she] dropped an informant off to buy drugs" at the 7-Eleven parking lot and observed "three other people waiting for drugs in that parking lot." She added that she had personally received "numerous complaints" of people running between the parking lot and the apartment complex, making drug transactions. Another officer testified that "[a]nytime you hear Apple Tree or 7-Eleven, your radar goes up a notch." Accordingly, when the Ranson Police Department received the tip about someone loading a gun in the 7-Eleven parking lot, its officers' "radar [went] up a notch," and the officers went "on heightened alert."

While still on the telephone with the caller, Officer Tharp relayed the information to Officer Kendall Hudson and Captain Robbie Roberts. Hudson immediately left the station to respond to the call, and Roberts left soon thereafter to provide backup.

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When Officer Hudson turned onto North Mildred Street a short time later, he observed a blue-green Toyota Camry being driven by a white woman with a black male passenger. Noticing that they were not wearing seatbelts, Hudson effected a traffic stop approximately seven blocks, or three-quarters of a mile, south of the 7-Eleven. He estimated that the traffic stop took place two to three minutes after the call had been received at the station.

After calling in the stop, Officer Hudson approached the driver's side of the vehicle with his weapon drawn but carried below his waist and asked the driver for her license, registration, and proof of insurance. He also asked the male passenger, the defendant Robinson, for his identification but quickly realized that doing so was "probably not a good idea" because "[t]his guy might have a gun[,] [and] I'm asking him to get into his pocket to get his I.D." Instead, Officer Hudson asked Robinson to step out of the vehicle.

At this point, Captain Roberts arrived and opened the front passenger door. As Robinson was exiting the vehicle, Captain Roberts asked him if he had any weapons on him. Instead of responding verbally, Robinson "gave [Roberts] a weird look" or, more specifically, an "oh, crap' look[.]" Roberts took the look to mean, "I don't want to lie to you, but I'm not going to tell you anything [either]." At this point, Captain Roberts directed Robinson to put his hands on top of the car and performed a frisk for weapons, recovering a loaded gun from the front pocket of Robinson's pants. After conducting the frisk, Roberts recognized Robinson, recalled that he had previously been convicted of a felony, and arrested him...Robinson was charged with the illegal possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1)...ⁱⁱⁱ

Robinson filed a motion to suppress and argued that the frisk violated the Fourth Amendment because, while the stop was legal and while the officer's had a reasonable belief he was "armed", they did not possess a reasonable belief that he was "dangerous." The district court denied the motion, and Robinson pled guilty with the right to appeal. He then filed a timely appeal with the Fourth Circuit Court of Appeals.

On appeal, at the outset, Robinson conceded four legal points as follows: (1) the stop was lawful, as it was based on a traffic violation; (2) the police had the authority to order him to exit the vehicle; (3) the anonymous tip received by the police was sufficiently reliable to allow the police to rely upon the information; and (4) the police had a reasonable belief that he was armed.

The sole issue on appeal was *whether the officers could have possessed a reasonable belief that Robinson was "dangerous," in addition to being armed, such that the frisk was lawful under the Fourth Amendment.* Robinson based this argument on the theory that, under *Terry*, in order for a frisk to be lawful, the suspect must be subject to a lawful stop, *and* the officer must have a reasonable belief that suspect is "armed and dangerous." Robinson argued that although he was subject to a lawful stop, and although the officers had a reasonable belief that he was armed, they did not possess any facts to reasonably believe that he was "dangerous." In fact, he argued that under West Virginia law, a person possessing a firearms license may lawfully carry a weapon in public, and the police did not have reason to believe that he did not possess a license.

In examining the issue, the court of appeals first noted that traffic stops are inherently dangerous for police officers. The court stated

The Supreme Court has explained that "the risk of a violent encounter in a traffic-stop setting 'stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop.'" Id. at 331 (quoting Wilson, 519 U.S. at 414); see also Mimms, 434 U.S. at 110 (rejecting "the argument that traffic violations necessarily involve less danger to officers than other types of confrontations"). Indeed, the Court has concluded that traffic stops are "especially fraught with danger to police officers." Long, 463 U.S. at 1047. And the Court has also observed that when the stop involves one or more passengers, that fact "increases the possible sources of harm to the officer," Wilson, 519 U.S. at 413, as "the motivation of a passenger to employ violence . . . is every bit as great as that of the driver," id. at 414.^{iv}

The court did note that this "inherent danger" does not automatically, without more, justify a frisk of all occupants of an automobile during a traffic stop.

The court went on to discuss the Supreme Court's decision in *Terry v. Ohio*. The court stated

In *Terry*, Officer McFadden "seized" Terry on the street and subjected him to a "search" without probable cause to believe that he had committed or was committing a crime or that he was armed. 392 U.S. at 19. The Court was thus confronted with two distinct constitutional issues: first, whether a person could be stopped (seized) on suspicion of criminal conduct that fell short of probable cause; and second, whether the officer could conduct a protective frisk or "pat down" for weapons (search) during the stop. **The Court readily concluded that Terry's seizure was "reasonable" under the Fourth Amendment because the officer reasonably believed that criminal conduct was afoot.** Id. at 22-23. **The Court then turned its attention to the legality of the frisk, stating, "We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him."** Id. at 23. **The concern -- i.e., the danger -- was thus found in the presence of a weapon during a forced police encounter.** Indeed, the Court said as much, noting in approving Officer McFadden's frisk of Terry that "a reasonably prudent man would have been warranted in believing petitioner was armed and thus presented a threat to the officer's safety." Id. at 28 (emphasis added). **In this manner, the Court adopted the now well-known standard that an officer can frisk a validly stopped person if the officer reasonably believes that the person is "armed and dangerous."**^v [emphasis added]

The court, based on the above, concluded that

[W]hen the officer reasonably suspects that the person he has stopped is armed, the officer is "warranted in the belief that his safety . . . [is] in danger," id. at 27, thus justifying a Terry frisk."^{vi} [emphasis added]

Thus, the Fourth Circuit reasoned that the Supreme Court intended to mean that when an officer has a person lawfully detained, and the officer has a reasonable belief that the person is armed, the fact that they're armed makes the person "dangerous." Thus, the person is in fact, "armed and dangerous."

To support the above conclusion, the Fourth Circuit also discussed the Supreme Court's ruling in *Pennsylvania v. Mimms*.^{vii} Specifically, the court stated

The Supreme Court applied *Terry* to circumstances analogous to those before us in *Mimms*, where an officer, after making a routine traffic stop, "noticed a large bulge" under the defendant's jacket and therefore conducted a frisk. 434 U.S. at 107. **Holding that the frisk was clearly justified, the *Mimms* Court explained that "[t]he bulge in the jacket permitted the officer to conclude that Mimms was armed and thus posed a serious and present danger to the safety of the officer,"** adding that "[i]n these circumstances, any man of 'reasonable caution' would likely have conducted the 'pat down.'" *Id.* at 112 (emphasis added). **The only evidence of Mimms' dangerousness was the bulge indicating that he was armed. See *id.* It was thus Mimms' status of being armed during a forced police encounter (the traffic stop) that posed the danger justifying the frisk, and we have previously relied on *Mimms* for that precise principle. See *United States v. Baker*, 78 F.3d 135, 137 (4th Cir. 1996) (citing *Mimms*, 434 U.S. at 112) ("Based on the inordinate risk of danger to law enforcement officers during traffic stops, observing a bulge that could be made by a weapon in a suspect's clothing reasonably warrants a belief that the suspect is potentially dangerous, even if the suspect was stopped only for a minor violation").^{viii}**

The court of appeals then summarized that both the frisk in *Terry* and the frisk in *Mimms* were both allowed by the Supreme Court because the officers in each case had made a valid stop and possessed a reasonable belief the person "was armed thus dangerous." The court then summed it up as follows:

In short, established Supreme Court law imposes two requirements for conducting a frisk, but no more than two: **first, that the officer have conducted a lawful stop, which includes both a traditional *Terry* stop as well as a traffic stop; and second, that during the valid but forced encounter, the officer reasonably suspects that the person is armed and therefore dangerous.**^{ix} [emphasis added]

The court then held that since both requirements were met in this case, the frisk of Robinson was justified as a matter of law.

The court of appeals also addressed Robinson's argument that West Virginia generally permits people to carry firearms thus a person forcibly stopped by the police may be legally permitted to possess a firearm. To this argument, the court stated

This argument, however, fails under the Supreme Court's express recognition that the legality of the frisk does not depend on the illegality of the firearm's possession. Indeed, the Court has twice explained that "[t]he purpose of this limited search [*i.e.*, the frisk] is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons might be equally necessary and

reasonable, whether or not carrying a concealed weapon violated any applicable state law." Williams, 407 U.S. at 146 (emphasis added); see also Long, 463 U.S. at 1052 n.16 ("[W]e have expressly rejected the view that the validity of a *Terry* search [*i.e.*, a frisk] depends on whether the weapon is possessed in accordance with state law").^x

In other words, a legally possessed firearm poses just as much potential for violence to an officer as an illegally possessed firearm. The purpose of a frisk is to allow an officer to complete the purpose of the stop without fear of violence, not to uncover evidence of a crime. As such, the rejected Robinson's argument.

The court then held

[W]e conclude that given Robinson's concession that he was lawfully stopped and that the police officers had reasonable suspicion to believe that he was armed, the officers were, as a matter of law, justified in frisking him and, in doing so, did not violate Robinson's Fourth Amendment rights.^{xi}

ⁱ No. 14-4902 (4th Cir. Decided January 23, 2017)

ⁱⁱ 392 U.S. 1 (1968)

ⁱⁱⁱ Robinson, No. 14-4902 at 5-7

^{iv} *Id.* at 11-12

^v *Id.* at 13-14

^{vi} *Id.* at 13

^{vii} 434 U.S. 106 (1977)

^{viii} Robinson at 14-15

^{ix} *Id.* at 15

^x *Id.* at 16-17

^{xi} *Id.* at 18