

“Am I Under Arrest”

A Review of Detention Without Arrest

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*Adrenaline is high for all parties involved. Perhaps the sounds of police sirens from a pursuit or traffic stop still linger, the sounds of a “flash-bang” reverberate in your ears as a search warrant is executed, hearing police officers yell at you to “get on the ground” or “show me your hands”, coupled with images of firearms being pointed at you, doors crashing down, a police K-9 sounding his presence, or uniformed officers in your face giving you commands. Suddenly you find yourself in handcuffs and look around and wonder “I was only riding with him, or I only dropped by to visit for a minute; am I under arrest?”*

## **Introduction**

Throughout my 28 years of police experience, I have had occasion to witness many of the sights and sounds described above. Since the vast majority of my career was spent in criminal investigation and/or narcotics, many times I have participated in the execution of high risk search warrants for known narcotics distribution locations or for wanted violent offenders where several individuals were handcuffed or detained. I have also experienced numerous times when several individuals riding in a motor vehicle or present together in a public place may have been removed and restrained. And each time I always hear the same question from the individuals: “Am I under arrest”?

Anyone who has been in law enforcement any amount of time has, at some point in their career, placed handcuffs on an individual, only later to take the handcuffs off and release the subject. With this in mind, several questions arise, including whether or not *is* this person under arrest, is it lawful to restrain the person without arresting him or her, do I need probable cause or reasonable suspicion to detain this person, and is it ok to “un-cuff” (some may say “un-arrest”) an individual after he has been handcuffed and send him on his way.

## **The Fourth Amendment**

To properly explore the issue the actions depicted above, we need to understand the Fourth Amendment. The Fourth Amendment of the Constitution of the United States was framed to protect people from unreasonable searches and seizures by the government. The Fourth Amendment reads “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized” (Constitution of the United States, Fourth Amendment).

The Fourth Amendment was intended to create a constitutional buffer between U.S. citizens and the intimidating power of law enforcement. It has three components. First, it establishes a privacy interest by recognizing the right of U.S. citizens to be “secure in their persons, houses, papers and effects”. Second, it protects this privacy interest by prohibiting searches and seizures that are “unreasonable” or are not authorized by a warrant based upon probable cause. Third, it states that no warrant may be issued to a law enforcement officer unless that warrant describes with particularity “the places to be searched and the persons or things to be seized” (Wikipedia, Fourth Amendment, Legal Definition).

Although it may not sound like it at first glance, the Fourth Amendment is not a guarantee against all searches and seizures, but only those that are deemed unreasonable under the law. Every situation that a police officer encounters on a daily basis is different, therefore we have no “bright line” or clear cut law that defines when a person can or cannot be detained for every situation that you may find yourself in. Through the next several pages we will explore several scenarios and what the courts have ruled about the detention of individuals without a warrant or arrest.

Several United States Supreme Court rulings come to mind when investigating the detention of a person. The United States Supreme Court has held “Whenever an officer restrains the freedom of a person to walk away, he has seized that person” (Tennessee v. Garner, 471 US 1, 708, 104 S. Ct. 1694, 1699 (1985)).

In another landmark U.S. Supreme Court decision, the Court stated “We adhere to the view that a person is ‘seized’ only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but ‘to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals” (Citations omitted, U.S. v Mendenhall, 446 U.S. 544, 552-555, 100 S. Ct. 1870, 1876-1877 (1980)). What does that mean to the police officer on the street wondering if he has the right to restrain someone? This area of the law is “fact” oriented, that is, facts of individual cases considered in the “totality of the circumstances” will be examined by the courts in determining when a lawful or unlawful seizure has occurred (Arkansas State Police Policy & Procedure, LE SEC 8). With that in mind, let’s examine several cases where the courts have ruled on detention and restraint.

### **Reasonable Suspicion**

According to the Arkansas Rules of Criminal Procedure (ARCP), restraint or detention without arrest requires reasonable suspicion as defined by ARCP 2.1 and governed by ARCP 3.1. ARCP Rule 2.1 defines reasonable suspicion as “a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion” (Arkansas Rules of Criminal Procedure Rule 2.1, Arkansas Criminal and Traffic Law Manual 2013).

In other words, you should be able to explain why you had more than a suspicion that criminal activity may be afoot and articulate that suspicion in your report. To take it a step further, the 8<sup>th</sup> Circuit Court of Appeals stated that “reasonable suspicion exists when an officer is aware of particularized, objective facts which, taken together with rational inferences from those facts, reasonably warrant suspicion that a crime is being committed” (United States v. Givens, 763 F. 3d 987, 989 (8<sup>th</sup> Circuit 2014)).

To further the facts that the courts look at the whole picture, they have cited “we look at the totality of the circumstances to determine whether reasonable suspicion existed, allowing officers to draw on their experience and training” (Lawhorn, 735 F. 3d at 820). The Courts have repeatedly not allowed the 20/20 vision of hindsight to cloud the facts that police officers are often forced to make split-second decisions and judgments. In other words, the Courts are looking at what happened from our point of view; the problem that we usually create for ourselves is not sufficiently articulating why we felt a certain way, exactly what we saw, or not going into sufficient detail for the judge reading behind us to understand the totality of the situation.

The Arkansas Courts have taken it a step further and ruled that in Arkansas, all police-citizen encounters are classified into one of three categories: (1) a consensual, voluntary encounter; (2) a seizure, or (3) an arrest (Cockrell v. State, 2010 Ark. 258, 370 S.W 3d 197).

### **Arkansas Rules of Criminal Procedure**

Since we practice our discipline in the State of Arkansas, it only makes sense to begin our examination with the rules that apply to Arkansas law enforcement officers. To do this, we turn to the Arkansas Rules of Criminal Procedure. We have discussed ARCP Rule 2.1 earlier, however ARCP Rule 3.1 takes it a step further and states “a law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed or is about to commit (1) a felony, (2) a misdemeanor involving the danger of forcible injury to persons or of

appropriation of or damage to any property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct". An officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of time not more than fifteen minutes, or for such time as is reasonable under the circumstances.

At the end of such period, the person detained shall be released without further restraint, or arrested and charged with an offense. (Arkansas Rules of Criminal Procedure, Rule 3.1, Arkansas Criminal and Traffic Law Manual 2013). So it seems that the rules permit the detention of a person when you have a reasonable suspicion that they have committed, or were about to commit a felony or certain misdemeanors for a reasonable amount of time. This would certainly cover many of the situations we encounter in our daily work, but the Rules also permit the temporary detention of a witness to a crime. The ARCP Rule 3.5 covers this by stating that "whenever a law enforcement officer has reasonable cause to believe that any person found at or near the scene of a felony is a witness to the offense, he may stop that person" (Arkansas Rules of Criminal Procedure, Rule 3.5, Arkansas Criminal and Traffic Law 2013). This would seem to cover some of those gray areas where you are not sure if the person present and being detained is actually a suspect or a witness to the crime. Now let's explore how the courts have ruled on some of the actions taken by law enforcement officers.

### **Search Warrant Detentions**

I have had the pleasure of working under many excellent supervisors over the past 28 years. One thing that has surprised me is the differing views on who can legally be detained while officers are executing search warrants and what the legal basis for the detention may be. By reading the Arkansas Rules of Criminal Procedure, we now clearly know that if we have reasonable suspicion that a person is committing a felony (or certain misdemeanors), or as a witness to a crime, that we may detain them a reasonable amount of time to investigate.

So, what is a reasonable amount of time? You will hear a lot of discussion about fifteen minutes being the set amount of time that you are allowed to detain a person without arrest. Although this is a good standard to follow in most circumstances, every situation is different. This is certainly true when dealing with the execution of search warrants. The execution of a search warrant is inherently dangerous to law enforcement officers; this risk is compounded when officers are executing a high-risk search warrant such as a narcotics search warrant.

We all know that drugs and guns go together; however, we must be able to articulate this fact to the courts on each and every encounter. You simply can't "check the box" that it is dangerous; you must explain why in detail. The Supreme Court has indicated their understanding by expressing "narcotics are often associated with weapons, an awareness that we have credited as a ground for heightened concern for officer safety" (United States v. Crippen, 627 F.3d 1056, 1063 (8<sup>th</sup> Circuit 2010)).

The Supreme Court has ruled that police officers may detain occupants of a premises while executing a search warrant, indentifying three governmental interests that justify such seizures: "preventing flight in the event that incriminating evidence is found; minimize the risk of harm to officers; and facilitating the orderly completion of the search" (Muehler v. Mena, 544 U.S. 93, 98 (2005)). Obviously the courts took up the issue of officer safety in this ruling, but took it a couple of steps further; one being to prevent flight in case incriminating evidence is discovered. If you allow everyone to run off when the search warrant is executed, obviously they will carry anything that they can away from the scene to prevent discovery by law enforcement, thus thwarting the investigative process. The last reason the court expounded on was to facilitate the orderly completion of the search. You will note that there was no time factor given in any of the ruling. Based on this ruling, it appears that the courts deem it permissible to handcuff everyone found in the structure being searched not only for the safety of the officers, but to prevent flight if evidence is discovered and to help facilitate the orderly completion of the search.

Although it is not discussed whether or not this includes leaving individuals handcuffed, it appears that the courts leave it to the discretion of the officer. Just make sure you have specific, articulable reasons to keep the handcuffs on an individual. For instance, if you are doing a narcotics search warrant at a known drug distribution house and the individuals that you are detaining have been observed or are known to frequent the residence, you should be able to articulate this fact to the court. Conversely, if it is a ten year old child that lives down the street and is just there to visit, you should use common sense and not detain that individual any longer than necessary.

The length of time that individuals have been detained has been taken up by the Courts as well. In one ruling, the Courts indicated that to determine whether a seizure is reasonable, we “balance the nature and quality of the intrusion of the individuals Fourth Amendment interests against the importance of the governmental interest alleged to justify the intrusion” (United States v. Place, 462 U.S. 696, 703, 1983).

To take that a step further, there is a very recent ruling from the 8<sup>th</sup> Circuit Court of Appeals on an Arkansas case where the complainants alleged that they were illegally detained during the execution of a search warrant. The parties also complained that they were detained an excessive amount of time and forced to remain in a break room. The 8<sup>th</sup> Circuit Court of Appeals ruled that the seizure was legal pursuant to a search warrant in the interest of officer safety and to prevent the destruction of evidence, and further that the detention was not excessively long due to the size of the business that was searched (Mountain Pure et al v. Cynthia M. Roberts, Bobbie Spradlin, John Doe 1-20, 8<sup>th</sup> Circuit Court of Appeals, 15-1656 (2016)). The courts opined that the Mountain Pure facility was extremely large and took agents a long time to search. Furthermore, the detainment of the individuals was necessary to prevent the destruction of evidence, and to keep any of the suspects from fleeing if the evidence was located. It did not violate the individual’s rights to be detained in a break room for an extended period of time to conduct this search.

The take-away point from that case is that you have to be able to explain in detail why you had to detain (seize) individuals for any extended period of time in detail.

The case that should be considered the “bright line” ruling on the question of detention without arrest in a search warrant situation is commonly known as the Summers Rule. Detroit police officers were executing a search warrant at a residence and encountered a subject leaving the residence; the subject was detained while officers searched the residence. During the search, officers discovered narcotics in the basement and then discovered that the detained individual lived in the residence. He was then arrested and a search of his person incident to arrest revealed several grams of heroin in his pocket.

The case found its way to the United States Supreme Court and the court held that the detention of Summers did not violate the Fourth Amendment. Justice Stevens, writing for the majority, noted that the detention did amount to a “seizure” within the meaning of the Fourth Amendment and assumed that the seizure was not supported by probable cause. However, the majority likened this case to its jurisprudence on street frisks, in *Terry V. Ohio*, and border searches, in *United States v. Brignoni-Ponce*, and explained that an exception to the general requirement of probable cause might be made based on the “character of the official intrusion and its justification”. With respect to the character of the intrusion, the majority opinion rested in large part on the fact that a neutral magistrate had issued a search warrant for contraband.

The court opined "Of prime importance in assessing the intrusion is the fact that the police had obtained a warrant to search respondent's house for contraband. A neutral and detached magistrate had found probable cause to believe that the law was being violated in that house, and had authorized a substantial invasion of the privacy of the persons who resided there. The detention of one of the residents while the premises were searched, although admittedly a significant restraint on his liberty, was surely less intrusive than the search itself."

The majority also noted that the detention of Summers carried little public stigma because he was being detained in his own residence, as opposed to in public.

The majority found three justifications for detaining occupants while executing a search warrant: (1) the legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found, (2) the interest in minimizing the risk of harm to the officers, and (3) the orderly completion of the search, which may be facilitated if the occupants of the premises are present. The majority also emphasized that the existence of a search warrant provides objective justification for the detention. On these grounds, the majority held that, for Fourth Amendment purposes, a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted” (Michigan v. Summers, 452 U.S. 692, 1982).

This decision has been challenged again and again in subsequent filings by appellants. However, the Supreme Court has affirmed numerous times that the Summers Rule permits officers executing a search warrant to “detain the occupants of the premises while a proper search is being conducted (452 U.S. at 705, 101 S.Ct2587) even when there is no particular suspicion that an individual is involved in criminal activity or poses a specific danger to the officers (Muehler v. Mena, 544 U.S. 93, 125 S. Ct. 1465, 160 L.Ed2d 299). As recently as 2013, the Summers Rule was quoted by the Supreme Court as being the bright line ruling defining detentions at search warrants scenes when it ruled on Bailey v. United States, No.11-770, 2013.

### **Traffic Stop Detentions**

Since most of us conduct traffic stops as a routine course of business, we tend to sometimes forget that a simple traffic stop is actually a seizure. I think we can all agree that when you activate your emergency lights and signal a driver to pull over, you are restricting his or her normal activities and he or she is no longer free to ignore you and walk/drive away until the stop is concluded.

There are many reasons to conduct a traffic stop, and most have been addressed by the courts at some point in time. We will discuss only a few of the more prevalent interactions that come to mind.

The most frequent traffic stop occurs when we observe a traffic violation or criminal violation of the law. The courts have ruled that “an officer may conduct a traffic stop if he has reasonable suspicion that a traffic violation has occurred or that criminal activity is afoot” (*Berkmer v. McCarty*, 468 U.S. 402 1984).

Once again you will note the use of “reasonable suspicion” instead of “probable cause” used by the courts. In fact, the courts have held that an officer need not be exactly right when making an investigative detention (traffic stop). One such case that comes to mind is where a Kansas City police officer conducted a traffic stop on a vehicle because he believed a person to be present in the vehicle that had an outstanding warrant. Once the stop was conducted, it was discovered that the individual was not in the vehicle; however, the officer developed reasonable suspicion that criminal activity was afoot after making contact with the occupants of the vehicle. Although the vehicle was originally pulled over based on reasonable suspicion that one of the occupants was wanted, the court held that “an officer who makes a lawful stop of a vehicle is entitled to conduct an investigation reasonably related in scope to the circumstances that prompted it” (*United States v. Shafer*, 608 F.3d 1056, 1063 8th Circuit 2010). In this particular case, the officer observed that the passenger was making overt actions consistent with a person concealing contraband or a firearm. Eventually the officer had backup and the passenger was ordered out of the car. During a pat-down search the officer discovered a firearm on the individual and he was arrested and charged with being a felon in possession of a firearm. During this same review, the courts cited that “an officer has the authority to inquire into the driver’s destination, to check the driver’s license and registration, or to request that the driver step out of the vehicle” (*United States v. Payne*, 534 F.3d 948, 951 8<sup>th</sup> Circuit 2008).

In exploring the issue of whether you have the right to order a driver or passenger out of a vehicle, the courts have made several more clear rulings. The 8<sup>th</sup> Circuit Court of Appeals noted that “We have recognized that police officers may order out of a vehicle both the driver and any passengers and perform a pat-down of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous” (United States v. Oliver, 550 F.3d 734, 737 8<sup>th</sup> Circuit 2008) To take that a step further, the courts opined “the officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in same the circumstances would be warranted in the belief that his safety or that of others was in danger” (Terry v. Ohio, 392 U.S. 1, 27, 1968). We will discuss the Terry ruling in more depth later in this document.

In another landmark ruling, the courts have held that “an officer may conduct a pat-down of the driver and passengers during a lawful traffic stop, the police need not believe that any occupant of the vehicle is involved in a criminal activity” (Arizona v. Jonson, 555 U.S. 323, 2009). The court’s ruling stated that the police may lawfully stop and detain an automobile and its occupants pending an inquiry into a minor traffic violation, and may conduct a pat-down search of an occupant if the police reasonably suspect that the individual is armed and dangerous. During a traffic stop, the police may order occupants to exit the vehicle pending completion of the stop. A police officer may pat down a driver once he or she exits a vehicle if the officer reasonably believes that the driver is armed and dangerous. Passengers are seized under the Fourth Amendment once the vehicle they are in, when stopped by the police, comes to a complete stop on the side of the road, and therefore have standing to challenge the constitutionality of the traffic stop.

Continuing with the argument about removing a driver or passenger from a vehicle, the courts have long relied on the officer’s experience and training and how a reasonable person in the officer’s shoes would have felt. This is why it is so crucial to write a thorough, detailed report on every encounter explaining exactly why you “did what you did”.

Many rulings have expounded on the officer's explanation (or lack thereof) of an arrest; one case on point is the statement "we determine whether an officer has reasonable suspicion by looking at the totality of the circumstances, taking into account the officers experience" (Shafer, 608 F.3d at 1062). If your report indicates that "I stopped the car for speeding and thought there was dope in it," you will probably lose the case somewhere along the line. However, if you articulate every detail about the stop, the speed, conditions, and all facts giving you a reason to stop the car, then follow that up with a detailed explanation of why you think dope was in that car, you should survive trial and appeal.

For example, I recognized one of the occupants of the vehicle as a known drug dealer that I have arrested for narcotics in the past; I ran the criminal history of the occupants and all had a history of narcotics violations; the occupants were acting nervous, wouldn't make eye contact and had differing stories about what they were doing, etc; I have found in my experience and training that persons engaged in narcotics commonly act like the individuals were acting. All of those statements will be taken into account by the courts and will give you a much better chance of surviving any appeals down the road.

There are thousands and thousands of scenarios surrounding traffic stops and detention, and we will have time to discuss only a few of them. One additional case I would like to touch on dealing with traffic stop detentions is *Lesa Diane Menne v. State of Arkansas* (CARC 10-577, December 2010). In the ruling, the Arkansas Supreme Court provided a good opportunity to review how courts look at reasonable suspicion and detention following a traffic stop.

In 2008, ASP Trooper Phillip Roark initiated a traffic stop on a vehicle traveling ten miles per hour over the speed limit. Before he returned the drivers documentation and concluded the stop, Roark asked for consent to search the vehicle. The driver (Menne) gave consent and Roark found meth, marijuana, and drug paraphernalia in the truck. At trial, Menne made a motion to suppress evidence seized from the truck.

After reviewing video and audio of the stop and hearing the attorneys' arguments, the trial court denied the Menne's motion to suppress and she was found guilty on all charges.

On appeal, the Menne's main argument was that she was illegally detained after the purpose of the traffic stop was over, in violation of case law and Arkansas Rule of Criminal Procedure 3.1. There were two issues for the Supreme Court to resolve: (1) whether the purpose of the traffic stop was over when Trooper Roark asked for consent to search the vehicle; and (2) whether Roark developed reasonable suspicion to detain Menne further.

The Supreme Court first held that it was unnecessary to determine whether the purpose of the stop was over when Roark asked for consent to search based on its conclusion that Roark had reasonable suspicion to detain Menne. But it did note that a traffic stop is not complete until the citation and documents are given back to the driver, and here Roark had not returned the registration and Menne had not signed the ticket when he asked for consent to search the vehicle. The majority opinion also rejected the appellant's argument, echoed by a dissenting justice, that the traffic stop was impermissibly extended by not issuing the ticket and returning the driver's documentation. In this particular case, the majority opinion stated that Menne failed to support this argument with case law or make a convincing argument.

Turning to the key question on appeal, the Supreme Court noted the fundamental requirements for reasonable suspicion under Arkansas Criminal Rule 3.1 and case law:

- An officer must have reasonable suspicion that a person is committing, has committed, or is about to commit a felony or misdemeanor involving danger to persons or property;
- The officer must develop reasonable suspicion to detain before the legitimate purpose of the traffic stop has ended; and

- Reasonable suspicion depends on whether the totality of the circumstances shows that the officer had “specific, particularized, and articulable reasons indicating that the person may be involved in criminal activity.”

Looking at the facts of the case, the Supreme Court found that Trooper Roark articulated sufficient factors in his affidavit and testimony to show that he had reasonable suspicion *during* the traffic stop that the driver was engaged in criminal activity.

Specifically, the court cited the following factors: (1) one month earlier Roark had stopped the same truck and arrested the passenger for DWI and possession of marijuana; (2) a criminal history check showed that the driver had been arrested previously; (3) Roark had information from the local police department that the driver was suspected of being a drug dealer; (4) the driver was nervous; and (5) the time of night.

Because the appellate court will always look at the “totality of the circumstances” in determining whether an officer had reasonable suspicion to detain, the more “circumstances” or factors you can articulate, as Trooper Roark did in this case, the greater the chance that the arrest and conviction will withstand review on appeal. In case you haven’t picked up on the point yet, always write a good report....

Many of us work in rural departments or in rural areas of the State of Arkansas. It is not uncommon for officers to conduct traffic stops late at night in rural areas where backup may be many miles away, if it is available at all. This creates a unique situation for officers that may find they want to search a vehicle suspected of containing contraband that has several occupants. The first thing to weigh is the question of whether the risk outweighs the gain. The most important aspect of our job is going home to our families at the end of our shift. I would suggest to you that no amount of dope is worth taking an extreme risk to your life. That being said, you may find yourself in that scenario with a suspect in the car that is being sought for murder. The Courts have long held that officer safety is a key point with the justices.

Using the above-stated rulings, it appears that it is permissible to remove the occupants and handcuff them, even temporarily, to conduct your investigation. Once the investigation is complete and there is no need for further detention, you should immediately release the individuals to go on about their business. It again comes down to being able to articulate your reasons and explain why the detention was necessary. In looking at this issue, the Courts have stated “to determine whether an individual’s fundamental rights have been violated in such a situation one must therefore balance the individual’s liberty interests against the State’s asserted reasons for restraining the individual. The question then is not simply whether a liberty interest has been infringed, but whether the extent or nature of the restraint or lack of absolute safety is such as to violate due process. With this in mind, however, we note that even if it is determined that the conduct at issue violated a fundamental right, it will constitute a substantive due process violation only if it is also determined to shock the conscience” (Slusaruchuk, 346 F.3d at 1181-82). One of the key take-away points here is the term “shocks the conscience”. In the situation we are addressing, where you reasonably suspect a homicide suspect to be in a vehicle late at night on a rural stretch of highway while you are alone, it is probably acceptable to remove and handcuff the occupants for your safety and to investigate the issue at hand (be prepared to articulate it though). However, if you stop “granny” on a Sunday afternoon and she can not produce proof of insurance and you pull her out, handcuff her and search her car (with no additional reason), you will probably “shock the conscience” of the court and find yourself in hot water!!!

### **Terry v. Ohio**

No review of investigative stops and detention would be complete without exploring a landmark decision that everyone should know as Terry v. Ohio, United States Supreme Court, 392 U.S. 1, 1968. The simple gist of the ruling states that an officer may perform a search for weapons without a warrant, even without probable cause, when the officer reasonably believes that the person may be armed and dangerous.

This applies to everyday contact with citizens, no matter whether dealing with a traffic stop, answering a disturbance call, or a simple “stop and frisk” which is now known as a “Terry Stop” .

This case began when a police officer noticed Terry talking with another individual on a street corner while repeatedly walking up and down the same street. The men would periodically peer into a store window and then talk some more. The men also spoke to a third man whom they eventually followed up the street. The officer believed that Terry and the other men were “casing” a store for a potential robbery. The officer decided to approach the men for questioning, and given the nature of the behavior the officer decided to perform a quick search of the men before questioning. A quick frisk of Terry produced a concealed weapon and Terry was charged with carrying a concealed weapon. Terry was convicted and appealed, and this case eventually found its way to the United States Supreme Court.

In this far-reaching decision, the United States Supreme Court held that the Fourth Amendment prohibition on unreasonable searches and seizures is not violated when a police officer stops a suspect on the street and frisks him or her without probable cause to arrest, if the police officer has a reasonable suspicion that the person has committed, is committing, or is about to commit a crime and has a reasonable belief that the person “may be armed and presently dangerous”.

For their own protection, after a person has been stopped, police may perform a quick surface search of the person’s outer clothing for weapons if they have reasonable suspicion that the person is armed. This reasonable suspicion must be based on “specific and articulable facts” and not merely upon an officer’s hunch. This permitted police action has subsequently been referred to in short as a “stop and frisk”, or simply a “*Terry* frisk”. The *Terry* standard was later extended to temporary detentions of persons in vehicles otherwise known as traffic stops.

The rationale behind the Supreme Court decision revolves around the understanding that, as the opinion notes, “the exclusionary rule has its limitations”. The meaning of the rule is to protect persons from unreasonable searches and seizures aimed at gathering evidence, not searches and seizures for other purposes (like the prevention of crime or personal protection of police officers).

To fully understand the Terry Rule, you should understand what the “exclusionary rule” is and what it implies. The exclusionary rule is a legal principle in the United States, under Constitutional law, which holds that evidence collected or analyzed in violation of the defendant’s constitutional rights is sometimes inadmissible for a criminal prosecution in a court of law (Wikipedia definition). This may be considered an example of a prophylactic rule formulated by the judiciary in order to protect a constitutional right. The exclusionary rule is grounded in the Fourth Amendment and it is intended to protect citizens from illegal searches and seizures.

The Terry Rule is a large ruling that set precedence on many aspects of our daily contact with citizens and when it is permitted or unconstitutional. To properly conduct our business in law enforcement, we should read and be familiar with all aspects of the Terry Rule and work within its standards.

Arkansas has closely mirrored the Terry Rule in the Arkansas Rules of Criminal Procedure, Rule 3.4, by stating “If a law enforcement officer who has detained a person under Rule 3.1 reasonably suspects that the person is armed and presently dangerous to the officer or others, the officer or someone designated by him or her may search the outer clothing of such person and the immediate surroundings for, and seize, any weapon or other dangerous thing which may be used against the officer or others. In no event shall this search be more extensive than is reasonably necessary to ensure the safety of the officer or others”.

## **Conclusion**

As law enforcement officers, we are often challenged daily with circumstances and events where we have to make quick decisions that may take a court of law many years to decide if we made the right decision. We have many useful tools on our belts and in our units to help us; a firearm when confronted by deadly force, a Tazer or baton for non-deadly force, a flashlight for low-light situations, a computer in your unit armed with ACIC/NCIC, or your radio for information or summoning backup. But, the biggest tool that we are armed with is knowledge of the law and our common sense. I have often heard it said that criminals are not rocket scientists, and that you can't fix stupid! We, as a law enforcement community, should strive to keep ourselves from falling into this same classification by doing our homework and making sure we are familiar with the law that we enforce, the Court's rulings that apply to our jobs, and most importantly the fundamental rights of the individual that this country was founded on to be sure that we conduct our business in a fair manner. No one, including the Court's, expects us to be trained attorneys; however, they do expect you to have a good working knowledge of the laws and rulings of the Courts and abide within them. This is why we have the "good faith" exception; if you are well versed in your profession and are acting with due diligence in executing your duties, you should reach retirement with a successful career.

The next time someone asks you "Am I under arrest", be sure you respond with the correct information: yes, you are under arrest (based on probable cause) or no, you are being detained (under reasonable suspicion), and feel comfortable with your response based on your knowledge of the law.

## References

452 U.S. at 705, 101 S.Ct2587

Arizona v. Johnson, 555 U.S. 323, 2009.

Arkansas Rules of Criminal Procedure, Rule 2.1, Arkansas Criminal and Traffic Law Manual 2013.

Arkansas Rules of Criminal Procedure, Rule 3.1, Arkansas Criminal and Traffic Law Manual 2013.

Arkansas Rules of Criminal Procedure, Rule 3.5, Arkansas Criminal and Traffic Law Manual 2013.

Arkansas Rules of Criminal Procedure, Rule 3.4, Arkansas Criminal and Traffic Law Manual 2013.

Arkansas State Police, Policy and Procedure Manual, L.E. Section 8

Bailey v. United States, No.11-770, 2013.

Berekmer v. McCarty, 468 U.S. 402, 1984.

Cockrell v. State, 2010 Ark. 258, 370 S.W. 3d 197.

Constitution of the United States of America, Fourth Amendment.

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