

Stop and Think Before You Stop and Frisk

The Fourth Amendment, A Landmark Case, And Liability Management

The Fourth Amendment to the U.S. Constitution protects individuals against unreasonable searches and seizures by law enforcement personnel. It limits the power of the police to make arrests, search people and their property, and seize documents, contraband, and objects. This is the foundation of search and seizure laws. Coupled with racial profiling rulings and definitions attendant to the equal protection clause of the Fourteenth Amendment, municipalities have numerous opportunities for risk management interventions in their law enforcement “stop and frisk” operations.

The Fourth Amendment

This amendment forbids law enforcement personnel from conducting searches and seizures without “probable cause.” The Supreme Court in 1968 “carved out” an exception to probable cause in the landmark case, *Terry v. Ohio*. The court ruled that in the absence of probable cause, an officer may detain a person if a lesser standard of “reasonable suspicion” has been satisfied. Further, the court wrote that a pat down frisk of the detained is justified if the officer has a definable fear that he or she “is dealing with an armed and dangerous individual.”

The New York State Attorney General’s Office analyzed the Terry ruling: The decision in Terry represents a struggle played out in law between the legitimate need for some level of police intervention short of arrest, and the Constitution’s mandate that civilians be free from unreasonable ‘searches and seizures.’”

The “Terry Stop”

Federal and state case law produce the parameters of what is a “stop” and provide law enforcement personnel with various rules with which to operate. The Supreme Court reasoned that a stop occurs when, “by means of physical force or by show of authority” a civilian is detained in such a way that “a reasonable person would have believed that he was not free to leave.” An officer must have reasonable suspicion that a suspect is committing, has committed, or is about to commit a crime. Reasonable suspicion is less than probable cause (which merits arrest) and greater than a hunch or “gut feel”. It must be based on specific, articulable, and rational facts. The stop often, but not always, leads to a frisk.

The “Terry Frisk”

The Terry Court defined a frisk as a “limited search for weapons, generally of the outer clothing, but also of those areas which may be within a suspect’s immediate control.” The frisk must be based on a

reasonable suspicion that the suspect is armed and dangerous. Its limited focus is to locate weapons that could be used to harm the officer. The search consists of patting the hands over the suspect’s person and the area under their immediate control.

The court noted that the weapon(s) need not be illegal. A pen or a cell phone might constitute items that could be used as a weapon and the officer may reach into that area of a suspect’s clothing to retrieve and inspect the item(s). Anything that falls out of a pocket during such a retrieval is considered to be in plain view and may be acted upon by the officer. Additionally, if during the pat down the officer feels an object that is “immediately apparent” to the officer to be of an incriminating nature (such as drugs wrapped in a certain way), that object may be retrieved and inspected.

When a frisk exceeds a mere pat down of outer clothing or the passenger compartment of a car, courts generally find that the seizure ceased being a Terry Stop and became an arrest. The greater the seizure’s intrusion, the more likely the officer will be required to demonstrate the higher standard of “probable cause.”

Terry in New York: The De Bour Ruling

The Terry ruling established the federal standard. New York State, in *People v. De Bour*, crafted additional progressive tiers of standards for guiding and judging police-civilian street encounters. The least intrusive level allows an officer to request information from a civilian about his or her identity and reason for being at a certain location and about where he or she is going. The

second tier allows for more intensive “common law” questioning so as to gain explanatory information beyond identity and travel plans. The individual is not considered detained at this point and is free to leave. The third level of intrusion authorizes an officer to temporarily hold an individual and conduct a stop and frisk. De Bour is slightly more nuanced here, requiring reasonable suspicion that a “particular person” has committed, is committing, or is about to commit a felony or misdemeanor. The fourth tier is arrest.

The Exclusionary Rule

Evidence recovered in an unconstitutional (“unreasonable”) manner is subject to the exclusionary rule forfeiting the government’s right to use it. It is the Fourth Amendment that allows for reasonable searches, and the Supreme Court has fashioned a two-part test for use when a defendant challenges admissibility: 1. Did the person subjectively (actually) expect some degree or privacy and 2. is the person’s expectation objectively reasonable, that is, one that society is willing to recognize? Only if both sides of that question are answered “yes” will the next and deciding question be entertained;

