WALKER v. CITY OF POMPANO BEACH: CAUSE TO BE WARY OF JUDICIAL SANCTION OF AGGRESSIVE POLICE TACTICS DURING TEMPORARY DETENTIONS

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I. INTRODUCTION

The only realistic limits imposed on the police in our society are those defined by the courts. In a time of fear of crimes, both real and imagined, the social climate appears distinctly to favor a more aggressive approach to law enforcement and the public attitude is seemingly more accepting of fewer controls over the police.

The facts of the false arrest case of Melvin Walker,[1] Leila Stephens, Terrance Tignor, and Otis Tignor[2] against the City of Pompano Beach illustrate the danger innocent citizens can face in this modern society and, more significantly, the degree to which police discretion can subject any member of society to moments of helpless terror.

II. THE FACTS

The *Walker* case illustrates how far society has come in allowing the police to use their most aggressive tactics even in situations when, by definition, they will be wrong a certain percentage of the time. On the night of November 19, 1996, police were on the lookout for three to five black males who had

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1. Melvin Walker is a female. *Walker*, 763 S.2d at 1147.

2. The court referred to him as Fred Tignor. *Id.* Born Otis Lee Tignor, he used the name Fred Tignor. Pl. Notice of Answering Interrog., Ans. to Interrog. — Otis Lee Tignor at ¶ 1, *Walker v. City of Pompano Beach*, No. CA-CE-98-002467(05) (Fla. 17th Cir. Ct. submitted Apr. 22, 1998).

committed three armed robberies of local restaurants.[3] Police stopped Melvin Walker's vehicle, occupied by four black individuals.[4] Two of them, sisters Leila Stephens and Melvin Walker, were fifty and fifty-nine years of age, respectively. They were taking their brother Otis, age forty-three, to the hospital for emergency medical treatment, and were accompanied by his son, their nephew, age twenty-three.[5] Ultimately, there was a finding in the case that the police were acting on a hunch rather than on reasonable suspicion.[6] However, it is significant that, even though only one occupant of the vehicle met the general description (young black male) of the robbers being sought, all four were subjected to the full exercise of force known as a "high risk felony stop."[7] This procedure, which is described in the Pompano Beach Police Department manual, requires that officers aim their sidearms or shotguns at the subject vehicle, that the driver be required (by aggressive, loud and amplified commands) to open the window and throw out the keys, that all occupants place their hands on top of their heads, that each occupant exit the vehicle one at a time and go to his or her knees or lie prone on the ground, and that each occupant be handcuffed before being frisked.[8] In this case, one fact that was not material to the court's inquiry was that Leila Stephens found herself trapped in the back seat by a child lock. This lock prevented her from opening the door from the inside and resulted in her being yanked physically from the vehicle by the police.[9] All of these steps were accomplished while at least one police dog roamed around the scene as they were laying on the ground.[10]

It is worth examining the fact that, given a few more drops of evidentiary support, this ordeal would have received judicial

3. *Walker*, 763 S.2d at 1147.

4. *Id.*

5. *Id.* Sadly, Otis Tignor died before remand and could not share in the settlement of the claim.

6. *Id.* at 1148.

7. *Id.*

8. *Policy and Procedures, Vehicle Stop — Felony/High Risk*, § 11.01.011, ¶¶ F(3)(d), (e), (m), H(4)(c), I(2), J(1)–(2) (Fla. Pompano Beach Police Dept. June 15, 1985) (excerpts on file with *Stetson Law Review*).

9. The Author, having represented the *Walker* plaintiffs at trial and on appeal, has first-hand knowledge of the facts of this case. The Author stands behind this statement and welcomes any questions regarding it or any part of this Last Word.

10. Pl. Notice of Answering Interrog., Ans. to Interrog. — Leila Stephens at ¶ 12, *Walker v. City of Pompano Beach*, No. CA-CE-98-002467(05) (Fla. 17th Cir. Ct. submitted Apr. 22, 1998).

sanction and, in fact, did receive such sanction in the trial court in which the city's motion for summary judgment was granted.[11] Although the Fourth District Court of Appeal reversed the trial court's finding,[12] there was not a hint of disapproval of the amount of police force used to effectuate the detention in question. The road courts have traveled to reach this point of often indiscriminate approval of police tactics illustrates the degree to which police safety has overcome concerns regarding citizen freedoms.

III. POLICE-CITIZEN ENCOUNTERS

Courts have recognized three basic levels of police-citizen encounters: the voluntary encounter, the temporary or investigative detention, and the arrest.[13] The voluntary encounter, by definition, is unfettered by legal restriction or evidentiary burdens.[14] It reflects the "right" of a police officer to have an uncoerced conversation with a citizen. Either party can terminate such a conversation at will.[15] Arrests and temporary detentions are similar in that they involve situations in which the citizen is, explicitly or implicitly, not free to terminate the encounter, and the officer is allowed to exercise physical control over the citizen.[16] They differ at their outset primarily in the caliber of evidence that is required for each. An arrest can be made only upon a police officer's *probable cause* to believe that a crime has been committed and that the citizen being arrested has committed it.[17] The temporary detention requires only *reasonable suspicion* that a citizen has committed, is committing, or is about to commit a criminal offense.[18] Again, the temporary detention, because it requires only a reasonable suspicion, involves a potential infringement on the rights of the truly innocent for a certain amount of the time.

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11. The trial judge determined that the police action was based on founded suspicion. *Walker*, 763 S.2d at 1147.

12. *Id*. at 1149 (reversing due to a lack of evidence to form a reasonable suspicion).

13. *State v. Jones*, 454 S.2d 774, 776 (Fla. Dist. App. 3d 1984).

14. *Id*.

15. *Id*.

16. *See id*. (distinguishing voluntary encounters from arrests and temporary detentions by the absence of coercion).

17. *Id*.

18. *Id*.

IV. TEMPORARY DETENTIONS

The decision of the United States Supreme Court in *Terry v. Ohio* is the commonly-recognized legal genesis of the temporary stop and detention (and frisk).[19] Significantly, in *Terry* the encounter commenced on the street when the police officer observed Mr. Terry and two associates apparently "casing" a business to rob it.[20] This observation led to a detention. The police stopped Mr. Terry and patted down the overcoat he was wearing.[21] This pat down revealed a concealed pistol and resulted in Mr. Terry's arrest and prosecution.[22] Chief Justice Earl Warren, writing for the majority of the Court, stated as follows:

> The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all. The Fourth Amendment proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation. The entire deterrent purpose of the rule excluding evidence seized in violation of the Fourth Amendment rests on the assumption that "limitations upon the fruit to be gathered tend to limit the quest itself."[23]

The Court thus found it necessary to balance the degree to which the police conduct constituted an "intrusion" on the liberty of Mr. Terry against the reasonableness of the police action in light of the basis of the officer's decision to stop him and the legitimate safety concerns that resulted in the frisk for weapons.[24] Chief Justice Warren defined the standard for such a stop as follows:

> [T]here is "no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails." And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant

19. 392 U.S. 1 (1968).

20. *Id*. at 6.

21. *Id*. at 7.

22. *Id*.

23. *Id*. at 28–29 (quoting *U.S. v. Poller*, 43 F.2d 911, 914 (2d Cir. 1930) (citation omitted)).

24. *Id*. at 20–21.

that intrusion.[25]

Florida courts have readily followed the *Terry* decision, and Florida Statutes Section 901.151[26] has been referred to as the "codification" of the *Terry* decision.[27] To justify a Section 901.151 temporary detention, the officer need not have "probable cause," a term that necessarily indicates a high probability of guilt.[28] Rather, the officer needs only a "founded suspicion." One Florida court defined a "founded suspicion" as

> a suspicion which has some factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge. "Mere" or "bare" suspicion, on the other hand, cannot support detention. Mere suspicion is no better than random selection, sheer guesswork, or hunch, and has no objective justification.[29]

V. EXPANSION OF STOP AND FRISK FROM A FOUNDED SUSPICION

Although the evidentiary standard for these detentions has remained intact, a steady progression of Florida cases has expanded the nature of the detentions themselves and the manner in which police may conduct them. In 1982, in *State v. Perera*,[30] Mr. Perera and his co-defendants complained that, when police displayed firearms during the stop of their vehicle for suspicion of marijuana smuggling, the display elevated their detention from a temporary detention to a full-blown arrest.[31] The Second District Court of Appeal held that the officers' use of sirens, flashing lights, and drawn weapons did not make the stop an arrest. The court reasoned that an officer cannot stop a vehicle in the darkness without signaling the vehicle, and the officers cannot be faulted for having their guns ready to protect themselves "where there is a clear possibility" of criminal activity.[32] The court held, "We know of no authority which limits the right of police to display a weapon where necessary to make a

25. *Id.* at 21 (quoting *Camara v. Mun. Ct. of City & County of S.F.*, 387 U.S. 523, 536–537 (1967) (second and third brackets in the original)).

26. Fla. Stat. § 901.151 (2001).

27. *Raleigh v. State*, 404 S.2d 1163, 1164 (Fla. Dist. App. 2d 1981).

28. *Brezial v. State*, 416 S.2d 818, 819 (Fla. Dist. App. 4th 1982).

29. *Id.* (citation omitted).

30. 412 S.2d 867 (Fla. Dist. App. 2d 1982).

31. *Id.* at 869.

32. *Id.* at 871.

stop."[33] In reaching this conclusion, the court relied on *Adams v. Williams*[34] and *Terry* for the proposition that a temporary stop can involve the display of force.[35]

Of course, in *Terry*, there is no mention of the use of guns by the officer, and the force discussed in *Adams* was limited to an officer reaching through an open window of a car to retrieve a firearm from the waistband of the driver, who had been sitting in the vehicle when the officer approached.[36] Thus, invoking two cases that did not speak directly to the issue, the Second District Court of Appeal gave its stamp of approval to the police use of firearms in effectuating a stop for which only founded suspicion was required. Notably absent from the Second District's analysis was the "balancing" of the degree of police action versus the intrusion on the citizen's liberty contemplated by Justice Warren.

Also in 1982, the Third District Court of Appeal, citing at length from *Terry*, held that the police had the "automatic" right to frisk for weapons when the crime for which the stop was being made was one that would lead a reasonable man to conclude that the suspects would be armed.[37] In a separate case, the Third District decided that the term "temporary" could include a ninety-minute detention.[38]

Again, as the concepts of a "temporary" detention and "minimal" intrusion quickly slid down the slippery slope, the courts focused on the jeopardy and danger to the police and paid little attention to the intrusions on the citizenry. Assuming this weighing of competing interests was in fact what the United States Supreme Court had in mind in *Terry*, a more comforting decision in 1982 was the Fourth District Court of Appeal's opinion in *State v. Hundley*.[39] Although upholding the temporary detention of a suspect found carrying a box in the area of a store that had been plagued by several recent burglaries, the court commended the minimal intrusion used by the police officer. The court noted that the police officer detained the defendant only long enough to ask his name and what he was doing, and to copy

33. *Id*.
34. 407 U.S. 143, 146 (1972).
35. *Perera*, 416 S.2d at 871.
36. *Adams*, 407 U.S. at 148.
37. *Russell v. State*, 415 S.2d 797, 798 (Fla. Dist. App. 3d 1982).
38. *Finney v. State*, 420 S.2d 639, 643 (Fla. Dist. App. 3d 1982).
39. 423 S.2d 548 (Fla. Dist. App. 4th 1982).

down a number from the box.[40]

In 1983, the United States Supreme Court further expanded the powers of the police to include vehicle searches during *Terry* detentions. The Court found that the balancing contemplated by *Terry* "clearly weighs" in favor of permitting the police to search the passenger compartment of an automobile for weapons, provided that the police "possess an articulable and objectively reasonable belief that the suspect is potentially dangerous."[41] The Florida Supreme Court signaled its agreement in *State v. Dilyerd*.[42]

In 1988, Florida courts decided that, during *Terry* stops, it was reasonable for the police to remove occupants forcibly from a vehicle at gunpoint,[43] to require suspects to lie prone on the ground for a period of time,[44] and, finally, to restrain suspects in handcuffs.[45] The "balancing" analysis had increasingly come to focus less on the liberty of the citizenry and more on the dangers facing police.

"Tragically, roadside shootings of police officers in this State and Country are frequent enough to be on the mind of every officer who makes a traffic stop," observed the Fourth District Court of Appeal,[46] having previously discussed the "chilling statistics on the number of Florida law-enforcement officers shot and killed, or otherwise seriously injured in the line of duty."[47] In *Pennsylvania v. Mimms*,[48] the United States Supreme Court described "the inordinate risk" facing a police officer who approaches a suspect seated in an automobile, citing a statistic that thirty percent of police shootings occurred during such approaches.[49] Although acknowledging that not all of the shootings occur during traffic stops, the notion that issuing traffic citations was necessarily less dangerous than other kinds of police-citizen encounters was rejected. "Indeed," the Court

40. *Id*. at 549.

41. *Mich. v. Long*, 463 U.S. 1032, 1051 (1983).

42. 467 S.2d 301, 303–304 (Fla. 1985) (quoting *Long*'s explanation of how the hazards of roadside encounters justified police protective searches of the passenger compartments of suspects' vehicles).

43. *State v. Lewis*, 518 S.2d 406, 408 (Fla. Dist. App. 3d 1988).

44. *State v. Ruiz*, 526 S.2d 170, 172 (Fla. Dist. App. 3d 1988).

45. *Harper v. State*, 532 S.2d 1091, 1093 (Fla. Dist. App. 3d 1988).

46. *State v. Louis*, 571 S.2d 1358, 1359 (Fla. Dist. App. 4th 1990).

47. *Wilson v. State*, 547 S.2d 215, 216 n. 1 (Fla. Dist. App. 4th 1989).

48. 434 U.S. 106 (1977).

49. *Id*. at 110.

concluded, "a significant percentage of murders of police officers occur when the officers are making traffic stops."[50] Weighing the risks, the *Mimms* Court upheld a police officer's usual practice of ordering drivers out of their vehicles during traffic stops.[51] "Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties."[52] Florida's Fifth District Court of Appeal signaled its agreement in *State v. Mahoy*.[53]

The balancing analysis under the Fourth Amendment in the *Mimms* decision helped the United States Supreme Court in *Maryland v. Wilson*[54] to hold that a police officer may, as a matter of course, order the passengers in a lawfully-stopped vehicle to exit the vehicle pending completion of a stop.[55] The *Wilson* decision noted that, "[o]n the public interest side of the balance, the same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver or passenger."[56] Citing statistics, the Court noted that, in 1994 alone, there were 5,762 officer assaults and eleven officers killed during traffic pursuits and stops.[57]

In *Reynolds v. State*,[58] the Florida Supreme Court directly addressed the issue of whether the use of handcuffs turned a *Terry* detention into an actual arrest. The court held that the action must be reasonable under the circumstances.[59] This requires the action to be justified at its inception, as well as "reasonably related in scope to the circumstances [that] justified the interference in the first place."[60] However, the Court's opinion basically left the matter in the hands of the police:

> [W]e do not find *Terry* and its progeny to prohibit placing a suspect in handcuffs during the course of an investigative detention where the circumstances reasonably warrant such

50. *Id*. (quoting *U.S. v. Robinson*, 414 U.S. 218, 234 n. 5 (1973)).

51. *Id*.

52. *Id*. (quoting *Terry*, 392 U.S. at 23).

53. 575 S.2d 779, 780 (Fla. Dist. App. 5th 1991) (quoting *Mimms*'s explanation of how the dangers of traffic stops justified a police officer's usual practice of ordering drivers out of their vehicles).

54. 519 U.S. 408 (1997).

55. *Id*. at 415.

56. *Id*. at 413.

57. *Id*.

58. 592 S.2d 1082 (Fla. 1992).

59. *Id*. at 1084.

60. *Id*.

> action. If an officer reasonably believes that an investigative stop can be carried out only in such a manner, it is not a court's place to substitute its judgment for that of the officer.[61]

The Fourth District Court of Appeal likewise signaled its willingness to defer to police officers' discretion when drawing weapons during a *Terry* detention.[62] Although using drawn weapons or handcuffs may not be appropriate for every *Terry* stop, "such actions are lawful where officers believe that their use is 'reasonably necessary to protect the officers' safety or to thwart a suspect's attempt to flee.'"[63]

VI. CONCLUSION

It thus appears that concern for citizen freedom has all but disappeared from judicial review of temporary detentions. Instead of the "balancing" analysis contemplated by *Terry v. Ohio*, courts have focused on police safety while ignoring citizen liberty. At the same time, courts have allowed the use of increasingly aggressive law-enforcement tactics. In *Walker v. City of Pompano Beach*, the plaintiffs rightly won their appeal because the police had no basis to stop Melvin Walker's vehicle. However, the court did not express any disapproval of the excessive tactics the police used against these innocent citizens. Indeed, the court easily could have sanctioned these excessive tactics with just a few more drops of evidentiary support. *Terry* stops and detentions are guaranteed to implicate innocent citizens some of the time, given the minimal factual support they require. Thus, the police and the courts should accord greater weight to civil liberties when considering the tactics police use during vehicle stops. The *Walker* plaintiffs were in a more precarious position than they should have been because the law has ignored the impact of these incursions on individual liberty. Although the dangers police face are undeniable, so, too, are the rights of citizens.

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61. *Id*. at 1085.
62. *Echevarria v. State*, 668 S.2d 1103, 1103 (Fla. Dist. App. 4th 1996).
63. *Id*. (quoting *Reynolds*, 592 S.2d at 1084).