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LAW ENFORCEMENT OFFICER TRAINING CASE OF THE MONTH

By Don Hays

Month of August – 2022 - ALTERNATIVE

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LAW ENFORCEMENT OFFICER TRAINING CASE OF THE MONTH

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United States v. Olson, No. 21-2128, 2022 WL 2800879, July 18, 2022

THE CASE: Olson armed himself during a riot. The police seized him and discovered a firearm. Legal seizure?

FACTS: On the evening in question, the police were dealing with riots in Madison, Wisconsin following the death of George Floyd. Three Officers were on duty when they first saw Kyle Olson. Olson parked a car directly across from where the Officers were watch. He was drinking an unknown liquid, which one Officer believed could be alcohol, from a “tallboy” aluminum can and looking around at his surroundings. The Officers considered this behavior unusual under the circumstances. According to the Officers, Olson appeared to be “checking a full 360” and scanning his environment to ensure he was not followed or observed by law enforcement. One Officer also interpreted Olson's behavior as designed to determine whether he was being watched. Given the unrest, the Officer believed Olson was preparing to engage in activity he did not want seen or discovered. All three officers then watched Olson take a black pistol from the trunk of the car, tuck the gun into his waistband at the small of his back, and pull his shirt over the gun. The officers decided to confront Olson.

The Officers approached Olson with their service weapons drawn and trained on him. One Officer ordered Olson to place his hands on the top of the car, and Olson immediately complied. Two other Officers secured Olson's hands while the third Officer proceeded to pat down Olson's back. The Officer felt what he believed to be the grip of a pistol at the small of Olson's back, lifted Olson's shirt, and pulled a black pistol from Olson's waistband. The Officer then walked approximately 10 feet away to a sidewalk to inspect the gun, which was fully loaded with a round in the chamber.

The Officers handcuffed Olson. A search of Olson incident to his arrest revealed drug paraphernalia. During this search, Olson “ma[de] an excited utterance stating that he was a felon.” While the officers took Olson into custody, they drew attention from an increasingly hostile crowd. Several people passed the officers yelling “fu** 12” and “let him go,” presumably referring to Olson. Several large crowds of up to 100 people continued to gather and approach the officers' position from a block away. The Officers believed the approaching crowds were responsible for setting several fires that night and damaging property, including with a baseball bat. For everyone's safety, the Officers moved Olson out of the street to a nearby front porch where one Officer radioed for assistance transporting Olson to the County Jail. While awaiting transportation, Olson again confessed he was a convicted felon. Olsen, who was charged with possession of gun as felon, moved to suppress. District Court denied the motion. Olsen appealed.

ISSUE #1: Terry Stop or De Facto Arrest?

ARGUMENT: Olsen argued on appeal that he was illegally arrested before the Officers had probable cause to support his arrest.

THE LAW: The Fourth Amendment protects people from unreasonable searches and seizures. Stopping someone is generally considered a seizure for which probable cause is required. In *Terry v. Ohio*, the Supreme Court recognized a limited exception to the Fourth Amendment's probable-cause requirement for brief investigatory stops. The salient difference between a Terry stop and a de facto arrest is the degree of justification required for the seizure. The former requires only reasonable suspicion of criminal activity while the latter demands probable cause. The distinction between a Terry stop and a de facto arrest is subtle. Terry stops often place law enforcement at great risk of physical danger. Consequently, law enforcement's use of force does not necessarily transform a Terry stop into an arrest where the circumstances give rise to a justifiable fear for personal safety. If, however, law enforcement's use of force during a Terry stop is “disproportionate to the purpose of such a stop in light of the surrounding circumstances ... the encounter becomes a formal arrest.” When considering whether use of force amounts to a de facto arrest, we examine “whether the surrounding circumstances would support an officer's legitimate fear for personal safety.” No two encounters are identical, so there is “no litmus-paper test for determining when a seizure exceeds the bounds of an investigative stop and becomes an arrest.”

FINDINGS: The officers approached Olson with their guns drawn, ordered him to place his hands on the hood of the car, physically secured his arms, disarmed him, and handcuffed him. In Olson's view, this amounts to a de facto arrest. The officers' decision to draw their weapons and handcuff Olson is atypical of a permissible Terry stop. The Court has consistently recognized, however, that the use of such force does not automatically convert a Terry stop into an arrest under

certain circumstances, such as when officer safety is in question, or a weapon may be present. The Court held that both situations are true here. Given the unique and extreme circumstances of the night in question, the Court declared that the officers' use of force when approaching Olson was eminently justifiable.

What little the officers knew about Olson when they decided to confront him demanded they do so with extreme caution. Having watched Olson conceal a gun in the waistband of his pants, the officers knew Olson was armed. One Officer saw Olson drinking from a “tallboy” style can possibly containing alcohol, suggesting Olson could be intoxicated. Olson carefully scrutinized his surroundings, which the Officers interpreted to be “countersurveillance” measures to avoid detection. The officers had little time to confront Olson before he had the opportunity to leave the area, and one Officer was particularly concerned Olson might pursue the group of officers that recently left the chapel. Each of the officers testified, and the district court found, that one purpose of the stop was to ensure law enforcement and civilian safety.

Beyond Olson's individual actions, the singular circumstances of the night in question reinforce the appropriateness of the officers' response. During the weekend of May 30–31, 2020, widespread “chaotic, volatile, and dangerous” civil unrest characterized by rampant violence and arson gripped Madison. Law enforcement and civilians alike faced a serious risk of grave bodily harm. Police officers were a particular target of an unpredictable mob comprised of several hundred people, some portion of whom came equipped with weapons and body armor. That weekend, protestors physically assaulted officers and threatened them with further violence and death. Indeed, shortly before the officers approached Olson, a group of MPD officers left the chapel to assist an injured comrade. In this explosive atmosphere, it would have been foolish for the officers to treat Olson with anything but the utmost caution. Olson's initial seizure was a Terry stop, not a de facto arrest.

ISSUE #2: Reasonable Suspicion?

ARGUMENT: Olson argued that the Officers possessed only a hunch of illegal activity when they confronted him.

THE LAW: Terry authorizes a limited intrusion into an individual's privacy without violating the Fourth Amendment where law enforcement officers have reasonable suspicion of criminal activity. Reasonable suspicion demands “only ‘a minimal level of objective justification,’ ” which is something “more than a hunch but less than probable cause” and significantly less than a preponderance of the evidence. Law enforcement must point to “specific and articulable facts which, taken together with rational inferences from those facts[,] reasonably warrant that intrusion.” Whether reasonable suspicion of criminal activity justified a Terry stop is a fact-intensive, objective inquiry encompassing the totality of the circumstances known to the officers at the moment of seizure. Officers may lean upon their experience and specialized training to draw inferences from and deductions about available cumulative information.

FINDINGS: Based on the available information about Olson, along with the circumstances of the night in question, the Court of Appeals concluded that the officers reasonably suspected Olson was engaged or about to engage in criminal activity. Olson's actions, demeanor, and the surrounding circumstances reinforced the reasonableness of the officers' suspicion Olson was engaged (or would soon engage) in criminal activity. Olson decided to come, armed with a gun, to a scene of active and dangerous civil revolt replete with criminality where officers and civilians were under direct threat of physical violence. True, proximity to criminal activity “does not, by itself, support a particularized suspicion” of Olson's criminality, but “it is among the relevant contextual considerations in a reasonable suspicion analysis.” Indeed, Olson arrived in downtown Madison around 11:00 p.m. on May 31, 2020, and was thus in violation of the city's curfew. Moreover, the district court credited the Officer's characterization of Olson's behavior prior to arming himself as “countersurveillance” which they interpreted as suggestive of his intent to “do something ... he didn't want ... seen or discovered” and avoid the attention of law enforcement. The Court noted that while Olson's evasive and cagey behavior was certainly subject to innocent construction, “behavior that may seem innocent under some circumstances may amount to reasonable suspicion when viewed in the context at play at the time of the stop.”

Further, the Court declared that it could not overstate the singularity of the conditions in Madison that night. The city experienced an almost complete collapse of civil order. Crowds of hundreds of enraged protestors roamed the streets, some of them armed, targeting MPD officers, and creating an intensely dangerous environment. Indeed, shortly before Olson's arrival, the crowd physically attacked an officer nearby. Olson elected to inject himself, and his gun, into this maelstrom. Considered holistically, the totality of the circumstances along with Olson's behavior easily satisfy the “minimal level of objective justification” required to establish reasonable suspicion for a Terry stop.

CONCLUSION: The order of the District Court denying Olson's motion to suppress was affirmed.

QUIZ QUESTIONS FOR THE MONTH OF AUGUST – 2022 - ALTERNATIVE

United States v. Olson, No. 21-2128, 2022 WL 2800879, July 18, 2022

1. Pursuant to the Fourth Amendment, an Officer's use of force always transforms a seizure or detention into an arrest.
 - a. True.
 - b. False.

2. *Terry* authorizes the detention of suspects without violating the Fourth Amendment where law enforcement officers have reasonable suspicion of criminal activity. Is this a true and accurate statement of the law under the Fourth Amendment.
 - a. Yes.
 - b. No.

3. In this case, the officers approached Olson with their guns drawn, ordered him to place his hands on the hood of the car, physically secured his arms, disarmed him, and handcuffed him. In Olson's view, this amounted to a de facto arrest for which the Officers lacked probable cause. Did the Appellate Court agree with this argument?
 - a. Yes.
 - b. No.

4. The People argued that the Officers had sufficient reasonable suspicion to justify a *Terry* stop of Olsen. The Appellate Court disagreed with this argument.
 - a. True.
 - b. False.

QUIZ ANSWERS AND DISCUSSION FOR THE MONTH OF AUGUST – 2022 - ALTERNATIVE

United States v. Olson, No. 21-2128, 2022 WL 2800879, July 18, 2022

1. Pursuant to the Fourth Amendment, an Officer's use of force always transforms a seizure or detention into an arrest.

b. False. As the Court held, "Terry stops often place law enforcement at great risk of physical danger. *United States v. Askew*, 403 F.3d 496, 507 (7th Cir. 2005). Consequently, law enforcement's use of force does not necessarily transform a *Terry* stop into an arrest where the circumstances give rise to a justifiable fear for personal safety.

2. *Terry* authorizes the detention of suspects without violating the Fourth Amendment where law enforcement officers have reasonable suspicion of criminal activity. Is this a true and accurate statement of the law under the Fourth Amendment.

a. Yes. This is the declaration of this Court in this case. "*Terry* authorizes a limited intrusion into an individual's privacy without violating the Fourth Amendment where law enforcement officers have reasonable suspicion of criminal activity. *Terry*, 392 U.S. at 30, 88 S. Ct. 1868; see also *Richmond*, 924 F.3d at 411."

3. In this case, the officers approached Olson with their guns drawn, ordered him to place his hands on the hood of the car, physically secured his arms, disarmed him, and handcuffed him. In Olson's view, this amounted to a de facto arrest for which the Officers lacked probable cause. Did the Appellate Court agree with this argument?

b. No. The Court concluded: "Olson's initial seizure was a *Terry* stop, not a de facto arrest.

4. The People argued that the Officers had sufficient reasonable suspicion to justify a *Terry* stop of Olsen. The Appellate Court disagreed with this argument.

b. False. The Court declared: "Based on the available information about Olson, along with the circumstances of the night in question, the officers reasonably suspected Olson was engaged or about to engage in criminal activity." Specifically, the Officers saw Olson drinking from a "tallboy" style can, which they reasonably inferred might contain alcohol, before arming himself with a gun. Consequently, one of the officers' objectives in confronting Olson was to determine whether he was drinking alcohol while carrying a gun.