

THE MYTH OF THE *TERRY* FRISK

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Both the United States and the Pennsylvania Constitutions protect against unreasonable searches and seizures.¹ These protections have been further honed through case law that works to define what sort of search is deemed to be “unreasonable.” However, as the Pennsylvania courts require more detailed justification for a frisk of a person, police are countering with increasingly vague and amorphous descriptions of suspicious behavior that work to justify an invasion of privacy. What starts as an investigation quickly devolves into a police officer going into the pockets of an otherwise law-abiding citizen on a fishing expedition that results in the officer retrieving small packets of drugs. Because the justifications given are vague and hard to challenge, defendants’ rights against unreasonable searches and seizures continue to erode.

In *Terry v. Ohio*,² the United States Supreme Court carved out a new category of inspection that fell somewhere between a “mere encounter” and a “search.” Balancing the need for police officers to protect themselves, and the privacy rights of individuals, the Supreme Court came up with the “frisk.” The frisk is a “limited search of the outer clothing” that can be done “for the protection of [the officer] and others in the area.”³ In order to stop someone in the first place, *Terry* requires that there be a reasonable suspicion that criminal activity is afoot.⁴ In order to then conduct a frisk of that person, the frisk may be done when “the persons with whom [the officer] is dealing may be armed and presently dangerous” and “where nothing in the initial stages of the encounter serves to dispel [the officer’s] reasonable fear for his own or others’ safety.”⁵ Pennsylvania adopted this same law in *Commonwealth v. Hicks*.⁶

It is one thing when a *Terry* frisk is done and a weapon is actually recovered, but in tens of thousands of misdemeanor cases in Phila-

1 U.S. CONST. amend. IV; PA. CONST. art. I, § 8.

2 392 U.S. 1 (1968).

3 *Id.* at 30.

4 *Id.*

5 *Id.*

6 253 A.2d 276 (Pa. 1969).

delphia, the *Terry* frisk is merely a mechanism to get into the defendant's pocket:

[A] police officer may seize non-threatening contraband detected through the officer's sense of touch during a *Terry* frisk if the officer is lawfully in a position to detect the presence of contraband, the incriminating nature of the contraband is immediately apparent from its tactile impression and the officer has a lawful right of access to the object.⁷

Pennsylvania has adopted the same law.⁸ Once the officer is in a position to do a frisk, he simply has to describe whatever he feels as "immediately apparent as contraband"⁹ and all of a sudden an investigatory stop that is designed simply to investigate whether criminal activity is afoot ends up with packets of drugs being recovered from the defendant's pockets: in other words, the frisk becomes a search. As long as the police can justify the stop and the frisk, they are home free to recover anything that is in a defendant's pockets as long as they know what language to use to justify it.

The *Terry* frisk allowed police officers to do a limited search with less than probable cause, but it was up to the state courts to further define what is required. In Pennsylvania, police officers began justifying their frisks with the generic phrase "for officer's safety." This presented a problem for the Pennsylvania courts, because in virtually every case where police conducted a *Terry* stop, they were able to justify an accompanying frisk by simply saying it was "for officer's safety." In an effort to limit the amount of frisks that were going on, the Superior Court added the additional requirement that "[t]o justify a frisk incident to an investigatory stop, the police need to point to *specific and articulable facts* indicating the person they intend to frisk may be armed and dangerous."¹⁰ Recognizing the abuse of power that was going on, the court reasoned that "otherwise, the talismanic use of the phrase 'for our own protection,' a phrase invoked by the officers in this case, becomes meaningless."¹¹

However, just as police were quick to say that they frisked people "for their safety," it did not take them long to adjust to this new requirement to describe articulable facts that the person they want to frisk is armed and dangerous. One could imagine that this would require the officer to point to things that would require evidence, such as describing something hard and shiny and silver that was in the de-

⁷ Commonwealth v. Stevenson, 744 A.2d 1261, 1265 (Pa. 2000) (explaining Minnesota v. Dickerson, 508 U.S. 366, 373–75 (1993)).

⁸ *Id.*

⁹ *Id.* at 361.

¹⁰ Commonwealth v. Myers, 728 A.2d 960, 962–63 (Pa. Super. 1999) (quoting Commonwealth v. Patterson, 591 A.2d 1075, 1078 (Pa. Super. 1991)) (emphasis in original).

¹¹ *Id.* (quoting *Patterson*, 591 A.2d at 1078).

fendant's pocket that the officer thought might be a gun, but turned out to be a cell phone. Instead, officers are using vague descriptions that are unsupported by evidence and hard to challenge. Two popular descriptions that police are using nowadays in court to justify their *Terry* frisks are that the defendant (a) had a bulge in his pocket, or (b) made a furtive movement.

Officers are fond of referring to the "bulge" they see in defendants' pockets that lead them to believe the defendant might have a weapon. The mere reference to seeing a bulge is usually enough for a judge to find that the officer had a specific reason to believe the defendant was armed and dangerous. A bulge could be a gun! But often the surrounding facts do not support the plausibility of a bulge. The defendant might be wearing baggy cargo shorts or pants with deep pockets, and the only thing taken from the defendant was a packet or two of drugs that are no bigger than the size of a postage stamp. Despite the lack of corroboration, it is rare for a judge to call the officer a liar about what he says he saw, and agree that the frisk was not supported by reasonable suspicion that the defendant was armed and dangerous.

Perhaps even more troubling is the description that the defendant made "furtive" movements. When testifying, this is frequently the totality of the description the officer will give to the court. It will be followed by "as a result of the furtive movements, I feared the defendant might be armed and dangerous so I frisked him, where I felt what I immediately knew to be narcotics packaging." Sometimes the "furtive movement" will be towards his waistband, making things sound even more fishy and dangerous. The problem with these descriptions is that they sound menacing, yet there is no way for the accused to defend against such a vague accusation. Sure, the defendant could take the stand in his own defense and say that he did not make a furtive movement, but how do you really prove that? Judges overwhelmingly seem to accept the officer's vague description as an articulable fact that the officer legitimately feared for his safety.

In both these cases, police are using vague and hard-to-challenge justifications to be able to conduct what is supposed to be a frisk for their safety in order to justify going into defendants' pockets in what is clearly a full-on search that requires full probable cause. Defendants are left with no way to challenge these assertions without simply calling the officers liars, leaving judges left to decide who to believe—the defendant who actually had contraband in his pocket, or the police officer who was just trying to protect himself. The result is that the safeguards intended to protect all of us from illegal searches are becoming no more than a sham.

