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Drawing and Pointing Weapons During a *Terry* Investigative Stop

❖ Introduction

The constitutional rules on the use of deadly force are fairly clear and are based on the objective reasonableness of an officer's conduct based on what he or she knew at the time that force was used. More complicated is the issue of under what circumstances may officers draw and point weapons with the potential of inflicting deadly or significant force when the actual use of such force is not immediately contemplated or justified-- such as during a *Terry* style investigative stop, where the officer may be concerned for his or her safety on the basis of a variety of factors.

Two previous articles in this Journal have discussed the issue of how courts have addressed this question in the context of when there may be civil liability for the pointing of firearms. We noted that:

"As to liability, the caselaw discussed in this two-part article reveals that courts will not lightly impose civil liability on officers for the drawing and display of firearms when officers act on the basis of the facts and circumstances they reasonably believe they are encountering." See Excessive Force Claims Concerning Pointing Firearms--Part 1, 2010 (10) AELE Mo. L. J. 101 and Excessive Force Claims Concerning Pointing Firearms--Part 2, 2010 (11) AELE Mo. L. J. 101.

In an important recent decision by the U.S. Court of Appeals for the Ninth Circuit, the court seemingly expressed a stricter, more mechanical rule that would seem to raise more of a presumption in many instances that the drawing and pointing of weapons is *per se* unreasonable in the absence of a very limited set of four special circumstances. It has been argued that this approach is at odds with the approach adopted by many other courts and has potentially negative implications for officer safety during *Terry* investigative stops.

This article reviews that Ninth Circuit decision, contrasts it with the approach of other courts, and examines some of the factors that officers should consider when deciding to draw and point their weapons during investigative stops. At the end of the article, a brief listing of relevant resources and references is presented.

❖ The Ninth Circuit Ruling

In *Rutherford v. McKissack*, #11-35740, 505 Fed. Appx., 2013 U.S. App. Lexis 1441 (Unpub. 9th Cir.), *cert. denied*, *Chin v. Rutherford*, #12-1201 2013 U.S. Lexis 4558, the court flatly stated that "officers cannot use firearms during a *Terry* stop absent special circumstances" described in the court's earlier decision in *Washington v. Lambert*, #94-56685, 98 F.3d 1161 (9th Cir. 1996).

The special or extraordinary circumstances in *Washington v. Lambert* were:

1. where the suspect is uncooperative or takes action at the scene that raises a reasonable possibility of danger or flight;
2. where the police have information that the suspect is currently armed;
3. where the stop closely follows a violent crime; or
4. where the police have information that a crime that may involve violence is about to occur.

In *Rutherford*, a Seattle police officer lawfully detained the occupants of a vehicle at approximately 2 a.m. in a location characterized as a dark, dead-end street. He was investigating suspected DUI and reckless driving violations that he had just observed. The officer was alone and an unfolding and dynamic situation developed. The officer had called for backup and was waiting for it to arrive.

While he did so, the suspects advanced towards him at different times, and he displayed his gun and told the male suspects to sit, in an attempt to stabilize the situation until his backup arrived. Subsequently, he was sued and held to have violated the plaintiff's Fourth

Amendment rights by exceeding the limits of an investigative stop as permitted by *Terry v. Ohio*, #67, 392 U.S. 1 (1968).

The trial court awarded $1 in nominal damages plus $90,000 in attorneys' fees. Ultimately, the federal appeals court upheld the trial court's ruling denying the officer's motion for judgment as a matter of law, and rejected the officer's argument that he was entitled to qualified immunity from liability. The city of Seattle indemnifies its officers, and was responsible for paying the attorneys' fee award.

The officer and the city filed a petition for certiorari review by the U.S. Supreme Court. That petition argued as follows:

> "This case presents questions of exceptional importance to law enforcement and citizens alike. The overriding question—which is frequently recurring and of undeniable public importance—is when does an officer's decision to draw his firearm during a lawful stop under *Terry v. Ohio*, 392 U.S. 1 (1968), convert the stop into an unconstitutional encounter? The Ninth Circuit holds that 'officers cannot use firearms during a *Terry* stop absent special circumstances' described in *Washington v. Lambert*, 98 F.3d 1181, 1192 (9th Cir. 1996). App. 3a; *see infra* n.3 (quoting *Lambert* 'special circumstances'). That kind of a rigid formula for reviewing the lawfulness of police conduct is the antithesis of the flexible, common-sense approach this Court and other courts of appeals have required for this and related Fourth Amendment inquiries. It reverses the customary Fourth Amendment inquiry. Instead of considering whether an officer's decision to display his firearm was reasonable under all the circumstances, the Ninth Circuit rule holds that an officer's use of a gun during a *Terry* stop is *unreasonable* unless certain, predetermined 'special circumstances' are present. And it invites a 'divide-and-conquer analysis' for invalidating police conduct by separately considering a discrete set of factors."

In *Rutherford*, the officer perceived the suspects as agitated and threatening, and drew his handgun as a precaution to safeguard his own safety in the isolated circumstances, at a time when he was outnumbered by three to one. One of the three men, subsequently during testimony, admitted that "we were screaming at him." As backup was just arriving, one of the men, the plaintiff, got up and advanced quickly in the officer's direction, alarming him. The officer interpreted this as either an attack or an attempt to flee. The man was subdued with the assistance of the backup officers, and placed under arrest for obstructing, a charge later dismissed.

On the basis of the absence of the four factors listed in *Lambert*, the Ninth Circuit found that the officer's decision to draw his gun on the plaintiff was "unreasonable under the circumstances."

This seemingly ignored that the officer was confronting the risk of letting a impaired or reckless driver leave the scene, the apparent intoxication of the suspects, their belligerent attitude and their approaches, the location of the encounter on a secluded dark dead-end street, and the fact that the officer was outnumbered, providing him with ample reasons to fear for his safety. It should be noted that the officer did not initially draw his gun, and only did so when one of the suspects approached him in a manner he believed might be threatening.

❖ The Approach of Other Courts

The 1st, 2nd, 5th, 6th, 7th, 8th, 11th and D.C. Circuits have not adopted similar formulaic rules for considering when the use of a firearm renders a *Terry* stop invalid, or which predetermines the particular "special circumstances" in which a gun may be displayed during such a stop. Generally speaking, most courts that have addressed the issue have instead adopted a totality of the circumstances approach, recognizing the widely varying complexity of the circumstances that officers may encounter and have to respond to.

In *Dorsey v. Barber*, #05-4235, 517 F.3d 389, 2008 U.S. App. Lexis 3650, 2008 FED App. 0086P (6th Cir.), for instance, an officer on traffic control duty heard a broadcast to be on the lookout for two car-theft suspects. He spotted two people fitting the description of the suspects and told them to stop. They refused, and did not stop until the officer displayed his service firearm. It was later determined that the two people were not the suspects.

The court found that forcing them to lie on the ground for no more than two minutes at gun-point until additional officers arrived was not excessive force. Based on the broadcast and his observations, the officer had reasonable suspicion to temporarily detain them at gunpoint. The court observed that reasonable suspicion "can be derived from such sources as informant tips, dispatch information, and directions from other officers."

In criminal and civil cases from other federal appeals courts, the totality of the circumstances approach has been applied. In *United States v. Pontoo*, #10-2455, 666 F.3d

20 (1st Cir. 2011), for example, the court stated that the lawfulness of the user of a gun during a *Terry* stop requires careful consideration of the totality of the circumstances, since it would be unreasonable to require officers to take "unnecessary risks in the performance of their duties." See also *Flowers v. Fiore*, #03-1170, 359 F.3d 24 (1st Cir. 2004), finding that the use of a gun by an officer during a *Terry* stop was reasonable under the "total factual context of the stop."

Similarly, in *U.S. v. Garcia*, #02-1419, 339 F.3d 116 (2nd Cir. 2003), the court rejected the argument that an encounter was converted from a *Terry* stop into an arrest by the officers' display of their firearms since that display was "reasonably related in scope to the circumstances which justified the interference in the first place."

"During a *Terry* stop," the court in *Radvansky v. City of Olmsted Falls*, #03-3798, 395 F.3d 291 (6th Cir. 2005) said, "officers may draw their weapons or use handcuffs 'so long as circumstances warrant that precaution.'" In accord are decisions in *United States v. Sanders*, #92-8309, 994 F.2d 200 (5th Cir. 1993) (Pointing a weapon at a suspect, ordering a suspect to lie on the ground, and handcuffing a suspect —- whether singly or in combination -— do not automatically convert an investigatory detention into an arrest unless the police were unreasonable in failing to use less intrusive procedures to conduct their investigation safely. "The relevant inquiry is always one of reasonableness under the circumstances."), *United States v. Shoals*, #06-3335, 478 F.3d 850 (7th Cir. 2007) (tactics used were "warranted given the inherent danger of the encounter"), and *United States v. Ocampo*, #86-1788, 890 F.2d 1363 (7th Cir. 1989) (the use of the gun by the officer was reasonable under all of the circumstances, which included looking at the "nature of the crime under investigation, the degree of suspicion, the location of the stop, the time of day, and the reaction of the suspect to the approach of the police.").

The totality of the circumstances approach was also followed by the Eighth Circuit in *United States v. Smith*, #10-3454, 648 F.3d 654 (8th Cir. 2011), finding that an approach with weapons drawn was reasonable under the totality of the circumstances for the officers' safety, and by the 10th Circuit in *United States v. Perdue*, #92-3140, 8 F.3d 1455 (10th Cir. 1993), finding that officers did not act unreasonably under the totality of the circumstances in executing a *Terry* stop with their weapons drawn.

Also in accord are the 11th Circuit, see *United States v. Blackman*, #91-6112, 66 F.3d 1572 (11th Cir. 1995), and the D.C. Circuit in *United States v. White*, #80-1087, 648 F.2d 29

(D.C. Cir. 1981), pointing out that "The lines drawn are not always sharp ones. Each situation is unique, involving the weighing and measuring of contrary indicators."

These flexible approaches, it may be argued, are far more protective of officer safety during *Terry* investigative stops than the Ninth Circuit's blanket rule that an officer should not draw his gun during such a stop in the absence of a limited number of designated special circumstances, regardless of how the situation may unfold. As stated in the petition for certiorari in *Rutherford*, currently in the Ninth Circuit:

> "Officers now face the prospect of Section 1983 litigation, personal damages awards, and attorneys' fees anytime they draw their firearm during a *Terry* stop because of a concern for their safety in an unfolding situation—whenever they cannot prove that the predetermined 'special circumstances' were present."

❖ Factors to Consider

Under the majority approach of the totality of the circumstances, officers can take into consideration a wide variety of factors in determining whether to draw and point their weapons during investigatory stops. Circuit Judge Emory A. Plitt, Jr., of Maryland, compiled a useful list of 13 common factors to take into account, published in AELE's *Police Use of Force – Law Instructor's Guide*.

As he noted, "Every situation is factually unique. There are a number of factors that can be considered in determining whether or not pointing a weapon is the use of force." They include:

1. Was the weapon pointed at a part of the suspect's body?
2. How far was the officer from the suspect?
3. Was the pointing of the weapon accompanied by any words spoken by the officer?
4. What was the reason the officer had the weapon out?
5. What were the circumstances?
6. Was it a potentially volatile situation?
7. Was there some need for the officer to gain control over the person or situation?
8. Were there any threatening words, gestures, or movements from the suspect towards the officer or another person?

9. Was the person armed or did the suspect possess any kind of weapon or other instrument that could be used as a weapon?
10. Could the officer clearly see that the suspect was/was not a threat?
11. What facts were made known to the officer from other sources (such as dispatch or radio transmissions from other officers)?
12. Had the suspect committed or was about to commit any criminal offense?
13. Did the suspect ignore or refuse to follow any lawful orders from the officer?

Drawing or pointing a weapon needlessly during an investigatory encounter might limit an officer's ability to control the situation, as well as create anxiety on the part of the suspects, causing them to react adversely. There is also, of course, the risk of an accidental discharge. Recognizing these prudent reasons for caution, however, should not be grounds for ruling out the drawing and pointing of weapons when appropriate and reasonable to protect the safety of the officer or others present.

At a minimum, an officer should always be able to articulate why a weapon was out and pointed at a suspect.

❖ Resources

The following are some useful resources related to the subject of this article.

- *Chin v. Rutherford*. U.S. Supreme Court filings.
- Current Legal Issues in Traffic and Investigatory Stops, by Ken Wallentine (2008).
- Electronic Control Weapons. AELE Case Summaries. [search for keyword pointing].
- Firearms Related: Intentional Use. AELE Case Summaries.
- Petition for a writ of certiorari, *Chin v. Rutherford*.
- *Terry* Stop Update, by Steven L. Argiriou (FLETC 2012).

❖ Prior Relevant Monthly Law Journal Articles

- Excessive Force Claims Concerning Pointing Firearms--Part 1, 2010 (10) AELE Mo. L. J. 101

- Excessive Force Claims Concerning Pointing Firearms--Part 2, 2010 (11) AELE Mo. L. J. 101
- Weapon Confusion and Civil Liability, 2012 (6) AELE Mo. L. J. 101
- Civil Liability for Use of Deadly Force-- Part One, 2007 (11) AELE Mo. L.J. 101.
- Civil Liability for Use of Deadly Force-- Part Two. Qualified Immunity and Inadequate Training, 2007 (12) AELE Mo. L.J. 101.
- Civil Liability for Use of Deadly Force-- Part Three. Supervisory Liability and Negligent/Accidental Acts, 2008 (1) AELE Mo. L.J. 101.

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