

Police Prosecutor Update

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REASONABLE SUSPICION TERRY STOP AND FRISK

On April 14, 2019, the Indiana Court of Appeals issued its decision in Berry v. State, ___ N.E.3d ___ (Ind. 2019). Two officers patrolling a high crime neighborhood at about 9:30 pm observed Berry and two other males in the middle of the street next to a car that was blaring loud music. The officers stopped and got out of their car. They did not display a weapon or speak in a “tone that would mandate compliance.” Berry began to back up, dropped his beer bottle on the ground, and looked right and left and back at officers. He moved his hands to his waist and then placed them in his pockets. One officer also observed a large bulge at the front left side of Berry’s waist. It appeared to have the outline of a handgun handle. The other two men with Berry did not exhibit the same behaviors.

Berry continued to back up and when the officer got close to Berry, he could smell marijuana. When asked, Berry told him he didn’t have a weapon. The officer then told Berry he was going to do a pat-down, and Berry complied. He was able to feel an object that was immediately apparent to him to be a bag of marijuana. The bulge observed earlier turned out to be a cell phone. He placed Berry under arrest and then removed two bags from Berry’s pocket, containing marijuana and cocaine. Berry moved to suppress the drug evidence. When his motion was denied, the trial court granted him leave to file an interlocutory appeal.

The court affirmed the trial court, finding the pat-down was objectively reasonable under the Fourth Amendment. All of the observations of the officers, taken together formed an objectively reasonable basis to believe that Berry “may have been armed and potentially posed a threat to officer or public safety.” Under Article I, Section 11 analysis, the court found that the officers concern was “high enough” to check Berry for weapons due to his “fight or flight” behavior. The court found that the ordinary pat-down was a fairly limited intrusion. Finally, the fact that there were two other men with Berry versus only two police officers increased the needs of law enforcement to act in these circumstances.

Terry stops are extremely fact specific. Keep in mind that in order to stop someone for investigation without a warrant or probable cause, a law enforcement officer must have a reasonable and articulable suspicion that criminal activity has occurred, is occurring or is about to occur. In order to take the extra step to check that person for weapons (the frisk or pat-down), the officer must also have a reasonable and articulable suspicion that the individual is armed.