St. John's Law Review

Volume 72, Summer-Fall 1998, Numbers 3-4 Article 3

The Prosecutor's Perspective on Terry: Detective McFadden Had a Right to Protect Himself

Reuben M. Payne

THE PROSECUTOR'S PERSPECTIVE ON *TERRY*: DETECTIVE McFADDEN HAD A RIGHT TO PROTECT HIMSELF

REUBEN M. PAYNE*

In all cases that appear before the Court, there are differences of opinion as to what happened or what took place. By the time *Terry v. Ohio*[1] reached the United States Supreme Court, it was my understanding that Mr. Chilton had been killed while perpetrating a robbery in Columbus, Ohio. Prior to the Supreme Court hearing, or subsequently thereto, Mr. Terry was confined to an asylum for the criminally insane. Hindsight speaks most eloquently on behalf of Detective McFadden's actions and conduct.

Speaking of Detective McFadden, he was an exceptional police officer. He had been on the force for thirty-nine years at the time of the *Terry* incident. Two years after joining the police force, his talents as an able, capable, and intelligent police officer were sufficient to earn him a promotion to detective. For approximately thirteen years, he handled cases that came through the detective bureau with excellent results. McFadden was injured and then assigned to light duty patrol in the downtown Cleveland area. He was often referred to as a "door shaker." A door shaker was a police officer assigned for benefit of the merchants in the heavy populated downtown area. His duties were to prevent petty thieveries and robberies, and to observe all persons who may be contemplating the commission of a robbery, pickpockets or boosters. He had an uncanny memory for faces and people who had been responsible for previous criminal activity. He would stand for hours observing people, their actions, and conduct.

* Retired attorney, Glendale, Arizona. B.A., Cleveland College, Western Reserve University, 1949; J.D., Cleveland-Marshall Law School, 1952. Assistant Prosecuting Attorney, Office of the Prosecuting Attorney, County of Cuyahoga, Cleveland, Ohio, 1953-1959, 1961-1969.

[1] 392 U.S. 1 (1968).

I do not recall a case that McFadden brought to the court wherein the matter was thrown out or the defendant acquitted. There were many arrests and convictions in the performance of his job. He had an ability to enunciate the facts, describe clearly what took place, and was renowned for the number of arrests and convictions made in the performance of his duty. He had a keen sense of intuition—"intuition" being something that becomes very important in the *Terry* case in discussions between Justice Marshall and myself.[2] McFadden was an exceptional, outstanding police officer.

McFadden had been on the force thirty-nine years. He was on duty when he observed two men on Euclid Avenue.[3] The streets were crowded and McFadden, true enough, testified "I didn't like them."[4] Knowing McFadden, that statement had not

---

[2] Justice Marshall and I had the following exchange during the *Terry* oral argument before the Supreme Court on December 12, 1967:

> Justice Marshall: So, where did he [Detective McFadden] get his expertise about somebody who is about to commit a robbery?
> Mr. Payne: I think that he would get his expertise by virtue of the fact that he had been a member of the police department for forty years, and by being a member of the police department for forty years, I am quite sure that, even if by osmosis, some knowledge would have to come to him of the various degrees—
> Justice Marshall: Now—
> Mr. Payne: —of crimes—
> Justice Marshall: Now we're getting intuition by osmosis?
> [Laughter]
> Mr. Payne: Not at all, sir.
> Justice Marshall: I hope not.
> Mr. Payne: Not at all. Not at all. I did not mean, I did not mean —
> Justice Marshall: Well, I'm sorry.
> Mr. Payne: —I didn't mean to imply that, nor did I mean any disrespect by so using that particular term. I think that, for example, if I as a lawyer am around a particular office for a number of years, that I certainly must gain knowledge about various concepts of law that may come about from time to time.
> Justice Marshall: There are exceptions to that.
> [General laughter]
> Mr. Payne: I would agree with the Court in these circumstances also.

The Oyez Project: U.S. Supreme Court Multimedia Database (visited Oct. 15, 1998) <http://oyez.nwu.edu/cases/cases.cgi?command=show&case_id=378> (containing a digital audio (RealAudio) version of the *Terry* oral argument); *cf.* 66 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 693, 706-07 (Philip B. Kurland & Gerhard Casper eds. 1975) (containing an imperfect transcript of the oral argument).

[3] *See Terry*, 392 U.S. at 5.

[4] Defendants' Bill of Exceptions, State v. Terry and State v. Chilton (Nos. 79,491 & 79,432), *reprinted in* Appendix, State of Ohio v. Richard D. Chilton *and* State of

one single thing to do with their race. It had to do with his previous observations studying people in general, as well as people who commit crimes and people who are involved in criminal activity. His statement referred to the classification of people which his duty called for him to be on the lookout for when he said he didn't like them.

What was Detective McFadden to do when he observed these two people? His police training and experience alerted him to the possibility the two men were involved in some type of criminal affair. Being a good police officer, he stepped back into the doorway and continued to observe the conduct of the men.[5] He observed them alternating, going back and forth, looking into a jewelry store and an airline's office.[6] McFadden concluded in his judgment, his mind, his intuition—whatever you want to call it—that they were casing an establishment for robbery.[7]

Now was there any fear in McFadden's mind? Analyze the question of fear by using several figures of speech: bread and butter go together; it's as clear as day and night. It would appear to me that an intelligent, trained police officer would know weapons and guns go together with robberies. Any sane person, especially a police officer who is knowledgeable about the hazards of his or her job, would have great agitation. He continued to observe the men and as he watched, a third man, Katz, came across the street to have discussions with Terry and Chilton.[8] McFadden's conclusion or intuition based on Katz's position and actions was that Katz was the lookout man for Terry and Chilton, who were about to commit a robbery.

Katz returned to his position across the street, and Terry and Chilton continued their conduct of alternating; going back and forth, looking in the airline office and jewelry store.[9] After several of the alternating trips, Katz, "the lookout," returned from across the street and again was involved in discussions with Terry and Chilton.[10] McFadden concluded it was time to

---

Ohio v. John W. Terry: *The Suppression Hearing and Trial Transcripts*, 72 ST. JOHN'S L. REV. 1387, 1456 (1998) [hereinafter *Terry* transcript].

[5] *See Terry*, 392 U.S. at 5-6.

[6] *See Terry* transcript, *supra* note 4, at 1450.

[7] *See Terry*, 392 U.S. at 6.

[8] *See id.*

[9] *See id.*

[10] *See id.*

act.[11] He felt that the men had concluded their observations and were about to rob an establishment.

Remember in the 1960s cellular phones were not in existence. 911 was not in existence. What was McFadden supposed to do? By training, he had a governmental responsibility to make inquiries and investigations for the benefit of society. He must be concerned for the people who were on and about the street. Based on the circumstances that he had witnessed, there was a duty and obligation to inquire about these men. He proceeded towards all three. They were together in the same vicinity of one another. There was no conduct or indication to McFadden that they were about to leave the premises. The indication was that they were commencing their venture "robbery" for that day. In McFadden's mind at the same time, based on the totality of all circumstances, was the fact that robbers carry weapons such as guns. Obviously, as a good police officer and a sane man, he had to have some fear of the possibility of being injured or shot.

McFadden approached the three men and inquired of their names.[12] They responded—incoherently.[13] Upon responding incoherently, McFadden demonstrated his fear that he might get hurt (a bullet) because he took ahold of Terry and placed Terry in front of him, facing the other two men.[14] That way, if there was shooting, Terry would get shot first and would be Terry was McFadden's protection or shield.

When McFadden grabbed Terry, he felt a bulge in Terry's coat.[15] He took Terry by the collar, pulled his collar down, pulled his own weapon, and ordered all three men off the street into a nearby store.[16]

Reviewing the facts in your own minds, what was he supposed to do? Should he have remained on the street, possibly getting into a gun fight and endangering pedestrians? He ordered them into the store, out of the way. It is true that he said, "call the wagon."[17] He did that because, as he said, "I felt a gun."

---

[11] *See id.* at 6-7.

[12] *See id.* at 7.

[13] *See id.* (explaining that defendants "mumbled something").

[14] *See id.*

[15] *See id.*

[16] *See id.*; *cf. Terry* transcript, *supra* note 4, at 1460 (noting that McFadden had his gun "handy").

[17] *Terry* transcript, *supra* note 4, at 1453.

[18] Into the store, the three defendants were required to place their hands against the wall, whereon he pulled Terry's coat down from the back in order to bind Terry's arms, so that Terry could no longer reach for a gun.[19]

McFadden proceeded to frisk. And he testified, "I felt something" and it was a gun.[20] He reached in and took it out. He then went to Chilton, patted him down, felt a gun in the side pocket, reached in and took it out.[21] Katz had nothing on him.[22] There was no inquiry as to why Katz was not released or charged.[23] McFadden placed all under arrest.[24] There was no question in my mind that they were all were under arrest when he pulled his weapon on the street. The wagon came and they were hauled in, charged, and we proceeded to trial.

When I was assigned this case in Cleveland, Ohio, we did not have the advantage or luxury of having an appeals section or the availability of using assistants on cases. The case was yours from the beginning; you interrogated police officers, you interrogated the witnesses, and you scheduled the witnesses. You often visited the scene of a crime with the police officers, and, if necessary you talked with the experts and coroner's office. You did all things legally required to present a good case.

Many attorneys, as well as my co-workers, said, "you can't win this particular case." Keep in mind the Fourth Amendment of the United States Constitution uses the terms, "probable cause" and "search warrants." These attorneys and co-workers felt that there might not have been probable cause and there was no search warrant. While I don't have "Alzheimer's," I have what I refer to as "sometimer's" and I can't remember the exact citation of the case which I felt was the one to support my arguments. I believe it was the *Rivera* case.[25] The case involved a

---

[18] *Terry* transcript, *supra* note 4, at 1411.

[19] *See Terry* transcript, *supra* note 4, at 1451.

[20] *See Terry* transcript, *supra* note 4, at 1411.

[21] *See Terry*, 392 U.S. at 7.

[22] *See id.*

[23] *But see Terry* transcript, *supra* note 4, at 1463 (asserting that Katz was arrested for "association").

[24] *See Terry*, 392 U.S. at 7.

[25] People v. Rivera, 201 N.E.2d 32 (N.Y. 1964). *Rivera*, like *Terry*, involved a detective who observed two men behaving suspiciously, stopped them, frisked them, felt a gun and seized a loaded .22 caliber pistol, resulting in arrest and a criminal prosecution for illegal gun possession. In a striking parallel to the facts of *Terry*, the *Rivera* incident began when the detective observed the "two men for about five min-

police officer in facts similar to those of the *Terry* case. The *Rivera* defendant was found guilty. On appeal in the New York Court of Appeals, a very pertinent question was asked by the appellate judge. The appellate judge advanced the question: When an officer, in the performance of his duty, asks a question in reference to suspicious conduct which he has observed, what is he to receive for an answer but a bullet?[26] Although the Supreme Court declined certiorari in *Rivera*,[27] because it was loaded with multiple issues, I decided to rely on the circumstances that were presented in that case.

Rivera was an important case for my decisions in preparing *Terry v. Ohio*. At the time of trial I did not realize or think in terms of *Terry* becoming a landmark case. The *Rivera* case heightened my desire to proceed with *Terry* on one issue and one issue alone. I believed one could prevail with that one issue. The issue was that McFadden, after enunciating the totality of the circumstances he witnessed and was being confronted with at that particular time, had a right to make a frisk for the protection of his own body and his own welfare.

When it reached the Court of Appeals and was argued,[28] due to civil liberties groups and other amici filings, I then began to realize this was a landmark case, and it would be helpful to have more than the *Rivera* case for support. I however chose not to give the Supreme Court multiple issues to decide, but rather elected to stick with the same theory of presenting a single issue. So I proceeded with one issue—the importance of this to police departments, to society and the welfare of the citizens of the community. Detective McFadden's intentions or intuitiveness

---

utes. They 'walked up in front, outside a bar and grill, stopped, looked in the window, continued to walk a few steps, came back, and looked in the window again. . . .' " *Id.* at 33.

[25] Judge Francis Bergan, writing for a six-Judge majority of the New York Court of Appeals, wrote in *Rivera*:

> If we recognize the authority of the police to stop a person and inquire concerning unusual street events we are required to recognize the hazards involved in this kind of public duty. The answer to the question propounded by the policeman may be a bullet; in any case the exposure to danger could be very great. We think the frisk is a reasonable and constitutionally permissible precaution to minimize that danger. We ought not, in deciding what is reasonable, close our eyes to the actualities of street dangers in performing this kind of public duty.

Id. at 35.

[27] Rivera v. New York, 379 U.S. 978 (1965).

[28] State v. Terry, 214 N.E.2d 114 (Ohio App. Div. 1966), *aff'd*, 392 U.S. 1 (1968).

was no more than the standard that courts have come to rely upon today: "reasonable suspicion." The case was affirmed in the Ohio Appeals Court and in the Ohio State Supreme Court.

The United States Supreme Court had an excellent premonition that this was a landmark case. The United States Supreme Court has a very strict procedure and protocol routine. On the right side of the lectern are two small lights, one red and one green. When the green light flashes on, you have five minutes remaining to conclude your remarks. When the red light flashes on, you shut up and sit down. In the *Terry* case, when the red light came on, the judges of the Court had propounding question after question to retained counsel for the defendant, Honorable Congressman Louis Stokes, and myself, for some ten or fifteen minutes.

By the way, the United States Supreme Court affirmed our position and *Terry v. Ohio* is still alive and well, and celebrating its thirtieth birthday. The rule today is that a police officer may act upon reasonable suspicion when he observes circumstances as existed in *Terry v. Ohio*.