

Whose Safety Matters More?



By Paul Engel

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- Whose safety matters more, law enforcement or civilians?
- Does being legally armed automatically make you a danger to society?
- Should officer safety override the Constitution of the United States.

Imagine you are stopped by law enforcement. Maybe you were doing something wrong, maybe not. At this point, when you are in the custody of law enforcement, whose safety matters more: Yours or that of the officer? In the 2017 Fourth Circuit case *United States v. Robinson*, while not specifically put this way, the question still came up. Does officer safety trump your right against unreasonable search and seizure, against even your own safety?

Background

To understand the decision in this case, we have to start at the beginning.

After receiving a tip that a man in a parking lot well known for drug-trafficking activity had just loaded a firearm and then concealed it in his pocket before getting into a car as a passenger, Ranson, West Virginia police stopped the car after observing that its occupants were not wearing seatbelts. Reasonably believing that the car's passenger, Shaquille Robinson, was armed, the police frisked him and uncovered the firearm, leading to his arrest for the possession of a firearm by a felon.

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After receiving a tip, it appears that law enforcement may have been looking for an excuse to search Shaquille Robinson, and they found one when he drove off without his seatbelt on. Using the anonymous tip about Mr. Robinson being armed as a pretext, the police frisked him and uncovered a firearm. Since Mr. Robinson was a felon, they arrested him for exercising his Second Amendment right after he had lost it for his felony conviction.

The Courts

Was the frisk legal? Did the police violate Mr. Robinson's right to be secure from unreasonable searches? Mr. Robinson thought so.

During his prosecution, Robinson filed a motion to suppress the evidence recovered as a result of the frisk, contending that the frisk violated his Fourth Amendment rights. The officers, he argued, had no articulable facts demonstrating that he was dangerous since, as far as the officers knew, the State could have issued him a permit to carry a concealed firearm. After the district court denied the motion to suppress, Robinson pleaded guilty to the illegal possession of a firearm, reserving the right to appeal the denial of his motion to suppress.

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Mr. Robinson has a very interesting point. Why should someone being in possession of a firearm lead to an assumption of dangerousness? After all, for all the officer knew, Mr. Robinson could have been a legal concealed carrier; he might even have had a carry permit. How does that establish reasonable suspicion that a crime was being committed? When that didn't work at the trial, Mr. Robinson tried again on appeal.

On appeal, Robinson contends again that the information that police received from the tip described seemingly innocent conduct and that his conduct at the time of the traffic stop also provided no basis for officers to reach the conclusion that he was dangerous. He argues, "Under the logic of the district court, in any state where carrying a firearm is a perfectly legal activity, every citizen could be dangerous, and subject to a Terry frisk and pat down."

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Mr. Robinson's argument on appeal gets even better. None of his conduct would lead a reasonable person to believe Mr. Robinson was dangerous unless you assume everyone with a gun is automatically a danger to society. And if everyone who legally carries a firearm is automatically subject to a Terry stop (from the case *Terry v. Ohio*), then merely exercising your right protected under the Second Amendment could be considered reasonable cause for a "stop and frisk."

There's another point that I find important, but didn't see in the court opinion. The tip was anonymous. Under the Sixth Amendment, you have a right to confront your accuser.

In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him;

[U.S. Constitution, Amendment VI](#)

If the reasonable assumption that the police used to search Mr. Robinson was based on an anonymous tip, how can he confront his accuser? So if Mr. Robinson cannot confront the person who accused him of carrying a loaded weapon in court, how can that be used for reasonable suspicion? After all, isn't an anonymous tip hearsay? For all the court may know, the accuser has a personal interest in seeing Mr. Robinson harassed, regardless of his guilt.

We reject Robinson's argument and affirm, concluding that an

officer who makes a lawful traffic stop and who has a reasonable suspicion that one of the automobile's occupants is armed may frisk that individual for the officer's protection and the safety of everyone on the scene.

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If the reasonable suspicion of the possession of a firearm is sufficient for an officer to frisk a suspect, what about the civilian? After all, there is a more than reasonable suspicion that law enforcement is armed. Does that give cause for the civilian to frisk the officer for his or her safety? If only one party is armed, then only one party is a threat to the safety of everyone.

The Fourth Amendment does not "require ... police officers [to] take unnecessary risks in the performance of their duties."

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The Fourth Amendment says no such thing. I agree, that police officers should not have to take unnecessary risks in the performance of their duties, but those duties include following the supreme law of the land. That is why their oath of office requires they swear or affirm to support the Constitution of the United States.

... It is also inconsequential that the passenger may have had a permit to carry the concealed firearm. The danger justifying a protective frisk arises from the combination of a forced police encounter and the presence of a weapon, not from any illegality of the weapon's possession.

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Which gets to the root of the problem. If the danger comes from the presence of a weapon during a forced police encounter, regardless of whether or not it is legal, why does it matter which party holds the firearm? If police were as

pure as the driven snow, then it would be reasonable for the threat to be one-sided. Then again, that would mitigate the need for police to have internal affairs divisions, and for other law enforcement entities to have inspectors general. While I'm sure the vast majority of law enforcement officers are just trying to do their job, there is plenty of evidence that some of those same officers have abused their position. Not to mention that some of those encounters have led to the assault and battery of the civilian, all while the civilian is defenseless before a government official. Isn't that why we have a Second Amendment, to make sure We the People aren't defenseless against a potentially hostile government?

The Traffic Stop

When Mr. Robinson was pulled over, the actions of the officer bring even more questions to this case.

Yes, Mr. Robinson was a felon, but did the officer know that at the time? The "tip" only identified "a black male in a bluish greenish Toyota Camry load a firearm [and] conceal it in his pocket." Yes, this black male was leaving a high-crime area, which to me may justify the desire to be armed. Yet look how the officer treated what should have been a routine traffic stop.

After calling in the stop, Officer Hudson approached the driver's side of the vehicle with his weapon drawn but carried below his waist and asked the driver for her license, registration, and proof of insurance. He also asked the male passenger, the defendant Robinson, for his identification but quickly realized that doing so was "probably not a good idea" because "[t]his guy might have a gun[,] [and] I'm asking him to get into his pocket to get his I.D." Instead, Officer Hudson asked Robinson to step out of the vehicle.

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I am not an attorney, and I'm not familiar with West Virginia

law, but is a passenger in a vehicle who is not wearing a seatbelt issued a citation, or just the driver? If not, what reasonable suspicion does Officer Hudson have that Mr. Robinson has committed, is committing, or is about to commit a crime? That is the requirement for a Terry stop and search. The only thing the officer knows is that the passenger is likely armed, that is, assuming this is the vehicle reported by the tipster. Based on this, Officer Hudson approaches the vehicle with his weapon drawn, giving those in the vehicle reasonable fear that their life is in imminent danger. I believe that is the trigger in all 50 states for a person to use lethal force to defend themselves. Remember, those in the car have no idea who the officer is or what his intentions are. All they know is that an armed person in uniform is approaching, and possibly that he has drawn his weapon.

Look at Officer Hudson's reasoning. He asked the passenger for his ID, then realizes that this was "probably not a good idea." Why? Because "[t]his guy might have a gun." Now look at this from the other point of view. They know the officer has a gun. They may even be aware that he has drawn his gun. I wonder how Office Hudson would have reacted if Mr. Robinson, knowing he was dealing with an armed law enforcement officer, drew his weapon because he knows the officer is armed?

Who has a more reasonable, articulable, suspicion that their life might be endanger? Is it the officer, who is approaching a vehicle with unknown occupants and the knowledge that traffic stops go bad? Or is it the passengers who have an unknown armed officer approaching and a knowledge that some officers abuse their position, something especially known to happen to black civilians? Either way, we have a potentially tense situation made worse by the presence of firearms on both sides, and the escalation of Officer Hudson drawing his firearm.

Then, Captain Roberts enters the picture.

At this point, Captain Roberts arrived and opened the front passenger door. As Robinson was exiting the vehicle, Captain Roberts asked him if he had any weapons on him. Instead of responding verbally, Robinson “gave [Roberts] a weird look” or, more specifically, an “ ‘oh, crap’ look[].” Roberts took the look to mean, “I don’t want to lie to you, but I’m not going to tell you anything [either].”

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So Mr. Robinson exercises his right to remain silent, but Captain Roberts sees “a weird look”? Then Captain Roberts begins reading minds. There could be many reasons why Mr. Robinson would have a “weird” or “oh, crap” look. He was in a vehicle stopped by law enforcement, asked for his ID, even though I’m not sure he could be cited for the offense of not wearing a seatbelt, asked to exit the car, then asked about weapons. That could easily bring an “oh crap” look to someone’s face. Remember though, even if Mr. Robinson is armed, the police have yet to establish a reasonable suspicion that Mr. Robinson is committing a crime.

At this point, Captain Roberts directed Robinson to put his hands on top of the car and performed a frisk for weapons, recovering a loaded gun from the front pocket of Robinson’s pants. After conducting the frisk, Roberts recognized Robinson, recalled that he had previously been convicted of a felony, and arrested him.

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Only now, after Mr. Robinson has been targeted for an act that was most likely perfectly legal, stopped, asked for ID, asked to exit the vehicle, and frisked, does law enforcement have a reasonable suspicion that Mr. Robinson was committing a crime? Not because he was carrying a firearm, but because Captain Roberts, after conducting the frisk, recognizes Mr. Robinson as a convicted felon. Which means the ID and frisk of Mr.

Robinson was conducted before police had reasonable suspicion of a crime. That is unless carrying a firearm is assumed to be a crime until proven otherwise.

Conclusion

I have a lot of concerns regarding this case. Yes, Mr. Robinson was in the act of committing a crime by being a felon in possession of a firearm, but no one other than Mr. Robinson knew that until after he was frisked. Yes, the stop was legal, since the officer observed the occupants driving without their seatbelts on. (The constitutionality of seatbelt laws is a question for another day.) But how does a seatbelt violation become a reasonable suspicion to frisk the passenger? Yes, there was a tip that the passenger was armed. That was an anonymous tip though, meaning there was no way for law enforcement to follow up and validate the tip without violating the rights of Mr. Robinson. And since it is legal in West Virginia to carry a loaded firearm, with certain restrictions, how is the tip reasonable suspicion of a crime? According to court records, Mr. Robinson was only identified as a "black male," so there was no way for police to search his record and identify him as a felon, which would be necessary to reasonably lead them to believe Mr. Robinson was committing the crime of a felon in possession.

I understand the bias to find against Mr. Robinson; after all he was found to be a felon in possession of a firearm. But do the ends justify the means? What's to prevent law enforcement from stopping you, or another innocent person, simply because they were observed in the perfectly legal act of loading a firearm and concealing it on their person? There are some places where I am not allowed to carry my firearm, so I lock it in my vehicle. When I exit, I check my firearm, then put it back in its holster. Should someone observe me doing this be sufficient for me to be frisked by law enforcement? Especially in Tennessee, where permit-less carry is legal? Is that not being considered guilty until proven innocent?

The courts might have had an easier time finding the frisk unreasonable if Mr. Robinson hadn't been a felon. Then again, hindsight is 20-20. At the time of the stop, Officer Hudson and Captain Roberts had no reasonable, articulable suspicion that Mr. Robinson was a felon, or that he did not have a carry permit. So, under the precedent of *Terry v. Ohio*, the police had no reasonable, articulable suspicion that Mr. Robinson was committing a crime, making the frisk an unreasonable search, violating the Fourth Amendment and Mr. Robinson's rights. This violation of Mr. Robinson's rights was compounded by both the District and Circuit courts who heard his case.

I guess, under current federal jurisprudence, the ends to justify the means, and gun owners are considered guilty until proven innocent

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