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People v. Thomas: Furtive Gestures as an Element of Reasonable Suspicion - The Ongoing Struggle to Determine a Standard

PEOPLE V. THOMAS: FURTIVE GESTURES AS AN ELEMENT OF
REASONABLE SUSPICION—THE ONGOING STRUGGLE
TO DETERMINE A STANDARD

I. INTRODUCTION

As Chief Justice Warren noted in *Terry v. Ohio*, “[S]treet encounters between citizens and police officers are incredibly rich in diversity.”¹ Equally rich in diversity are the interpretations of the fourth amendment² protections against unreasonable search and seizure.³ The history of the fourth amendment teaches that whether or not a search is a reasonable intrusion in a given situation is grounded upon more than an individual, ad hoc decision.⁴ Presently, however, there is not an objective methodology established by the U.S. Supreme Court for determining constitutional reasonableness.⁵ The Colorado Supreme Court has likewise struggled, without consistency, to determine probable cause, reasonableness for search and seizure, and the exclusionary rule.⁶

Justice Clark’s oft-quoted remark that “There is no war between the Constitution and common sense”⁷ is, sometimes, less true in the practice of criminal procedure than in other areas of the law. In the attempt to find the balance between the investigator’s need to obtain evidence by search and seizure, and the individual’s right to privacy and personal security, the courts have wavered from one extreme to the other, straining both common sense and the Constitution.⁸ Most commentators agree that the “sliding-scale” approach which balances these interests, but provides no firm criteria, is not practical for application by police officers in daily street encounters.⁹ Rather, it has been suggested the courts should devise a test that defines the “quantum” of evidence which must be present before official action is

1. *Terry v. Ohio*, 392 U.S. 1, 13 (1968).

2. The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The fourth amendment was made applicable to the states through the fourteenth amendment in *Mapp v. Ohio*, 367 U.S. 643 (1961).

3. See *Terry v. Ohio*, 392 U.S. 1, 35-39 (1968) (Douglas, J., dissenting).

4. Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1979 U. ILL. L.F. 763.

5. *Id.* at 763.

6. *Compare* *People v. Thomas*, 660 P.2d 1272 (1983) with *People v. Waits* 196 Colo. 35, 580 P.2d 391 (1978).

7. *Mapp v. Ohio*, 367 U.S. 643, 657 (1961).

8. See, e.g., *Terry*, 392 U.S. at 36 (1968). Justice Douglas’ dissent expressed dismay at the majority’s inconsistency and lack of common sense: “We hold today that police have greater authority to make a ‘seizure’ and conduct a ‘search’ than a judge has to authorize such action. We have said precisely the opposite over and over again.”

9. LaFave, *“Street Encounters” and the Constitution: Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 39, 56 (1968).

taken.¹⁰ Then, according to this view citizens would be aware of what behavior is reasonably expected of them, and police officers would not need to risk on-the-spot judgments.

*People v. Thomas*¹¹ represents an attempt by the Colorado Supreme Court to tighten and clarify definitions and standards applied in search and seizure cases. Although *Thomas* did help to clarify the standards for reasonable suspicion, the inherent lack of firm standards in police stops has not been fully addressed. This article traces the federal and state judiciary's failure to develop consistent and objective standards for application of fourth amendment principles and concludes with two alternatives to the traditional ad hoc analysis. This new approach would provide an easily delineated and minimally intrusive procedure for law enforcement officers to adopt in "stop and frisk" encounters which result in searches for drugs.

II. DEVELOPMENT OF FOURTH AMENDMENT PRINCIPLES

A. *Warrantless Searches*

The fourth amendment was designed to ban arbitrary and unjustified searches and seizures.¹² The requirement of a judicially issued search warrant was chosen by the authors of the Constitution to aid these goals.¹³ The general rule that police must whenever possible obtain an advance warrant recognizes the inherent danger of subjecting citizens to searches and seizures based on "suspicion-charged judgments of police officers engaged in the often competitive enterprise of ferreting out crime."¹⁴

B. *Arrests, Stop and Frisk, and Investigatory Stops*

No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others . . .¹⁵

The pivotal question in most search and seizure cases is whether the suspect's initial detention was an unreasonable seizure. The fourth amendment right against unreasonable search and seizure applies to citizens regardless of whether they are in public or at home.¹⁶ The Court in *Miranda v. Arizona*¹⁷ defines an arrest as a situation in which a reasonable individual, under the circumstances, would believe that his freedom of movement was limited such that he was not free to go.¹⁸

The fourth amendment governs seizures of citizens which do not result in a trip to the police station and prosecution for a crime. Under the ruling

10. *Id.* at 57.

11. 660 P.2d 1272 (Colo. 1983).

12. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 417 (1974).

13. *Id.* at 417.

14. *Id.* at 414, citing *Johnson v. United States*, 333 U.S. 10, 14 (1948).

15. *Terry v. Ohio*, 392 U.S. 1, 9 (1968), quoting *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891).

16. 392 U.S. at 8-9.

17. *Miranda v. Arizona*, 384 U.S. 436 (1966).

18. *Id.* at 478.

in *Terry v. Ohio*,¹⁹ whenever a police officer accosts an individual and restrains his or her freedom to walk away, the officer has "seized" that person.²⁰ In order to be a valid arrest, the officer must have knowledge, before the arrest, of facts, not mere rumor or conjecture,²¹ which indicate that the person arrested has committed or is committing a criminal offense²² at the actual moment of the arrest.²³ Evidence discovered after an arrest cannot be used to provide probable cause for the arrest.²⁴ Similarly, probable cause for a search cannot be based on interpretations of the defendant's conduct which appear reasonable only in the light of evidence uncovered in that very search.²⁵

III. BACKGROUND

A. *Stops and Frisks: Terry v. Ohio, Then and Now*

In *Terry v. Ohio*,²⁶ the Supreme Court set forth detailed guidelines for the police regarding situations where they are confronted with suspicious behavior. The Court balanced the citizen's right to be free from unreasonable government intrusion against the state's need to investigate criminal activity.²⁷ When such activity happens, *Terry* permits a seizure of the citizen for brief questioning and a patdown of his clothing for weapons.²⁸ This encounter is justified by the need for effective crime prevention and detection by police. In each case there must be a specific factual justification, based on what the officer sees and experiences, to justify the *Terry* inquiry.²⁹

The Court stated in *Terry* that the justification for the investigatory stop in each case would be judged strictly by an objective standard.³⁰ Thus, whenever a citizen is stopped the police officer must be prepared to articulate specific facts justifying that action. These facts do not have to rise to the level of probable cause — the arrest standard — or even a reasonable belief that someone has committed a crime. The facts must, however, be sufficient to arouse the police officer's curiosity and specific enough to be articulated in court.³¹

Terry specifically avoided the issue of whether the police can stop and detain a person for investigation solely on the basis of reasonable suspicion of criminal activity.³² *Terry* held only that a suspect can be physically seized

19. 392 U.S. 1, 16 (1968).

20. *Id.*

21. *People v. Severson*, 39 Colo. App. 95, 561 P.2d 373 (1977).

22. *Id.* at 376; COLO. REV. STAT. § 16-3-103 (1973 & Supp. 1983).

23. *Severson*, 39 Colo. App. 95, 561 P.2d 373 (1977).

24. *Sibron v. New York*, 392 U.S. 40, 63 (1968); *Commonwealth v. Jeffries*, 454 Pa. 320, 311 A.2d 914 (1973).

25. *People v. Superior Court of Yolo County*, 3 Cal. 3d 807, 478 P.2d 449 at 457, 91 Cal. Rptr. 729 (1970).

26. 392 U.S. 1 (1968).

27. *See, e.g., Camara v. Municipal Court*, 387 U.S. 523, 534-35 (1967) (where the Court first developed this balancing approach for administrative searches).

28. 392 U.S. at 30.

29. *Id.* at 21.

30. *Id.*

31. *Id.* at 21-22.

32. In a footnote, the Court stated: "We thus decide nothing today concerning the consti-

for the purpose of conducting a frisk if the police officer has reasonable suspicion of criminal activity and a reasonable belief that the suspect is armed and dangerous.³³

In two related cases decided the same day,³⁴ the Supreme Court developed and applied the principles announced in *Terry*. In *Sibron v. New York*³⁵ the Court interpreted the constitutionality of New York's stop and frisk statute. The Court declined to rule on the constitutionality of the statute, and held merely that the police acted reasonably.³⁶ The Supreme Court decided the best method for determining the lawfulness of a stop and frisk was to decide each case based on the specific, concrete factual circumstances involved in the police encounter regardless of the provisions of the statutes.³⁷

The Court ruling emphasized that each case would be judged on its particular facts in light of fourth amendment requirements regardless of what labels the state attaches to the conduct involved.³⁸ Although states are permitted to develop statutory guidelines regarding standards for search and seizure to meet the needs of local law enforcement, these standards must meet the requirements of the fourth amendment.³⁹

Sibron further held that police observation of the defendant talking and associating with known narcotic addicts over an eight hour period was insufficient to connect the defendant with criminal activity. The ruling emphasized that an incident search cannot precede a valid arrest, and that it was significant that the officer was interested in obtaining drugs, not weapons, from the search.⁴⁰

In *Sibron*'s sister case, *Peters v. New York*,⁴¹ the Court held that the officer had not only reasonable suspicion to stop the defendant, but also probable cause to arrest. In *Peters*, the arresting officer heard noises in the hallway of his apartment building. He glanced out and observed the defendant with another man, "tiptoeing furtively about the hallway."⁴² When he opened the door, the two men took off, running down the stairs. The officer caught one of the men and proceeded to search for weapons. The search produced an instrument commonly used for burglaries.

tutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation." 392 U.S. at 19 n.16.

33. *Id.* at 30. As one commentator suggests, the lower courts have taken the two elements found necessary in *Terry* to conduct a protective frisk — reasonable suspicion of criminal activity and a reasonable belief that the suspect is armed — and has created from them a bifurcated standard quite different from the original intent of *Terry*. *E.g.*, 1 W. RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS § 13.1(c)(1979).

34. *Sibron*, 392 U.S. 40 (1968) (reported with *Peters v. New York*).

35. 392 U.S. 40 (1968).

36. *Id.* at 61-62.

37. *Id.* at 59.

38. *Id.* at 62.

39. *Id.* at 60-61. For a view advocating that states give more protection under their own constitutions see generally Brennan, *State Constitutions and the Protection of Individuals Rights*, 90 HARV. L. REV. 489 (1977).

40. 392 U.S. at 62-63.

41. 392 U.S. 40 (1968) (decided with *Sibron*).

42. *Id.* at 66.

In upholding the trial court's admission of the burglary tool, the Court held that:

[D]eliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea*, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest.⁴³

A concurring Justice agreed with the result reached in *Sibron*, but questioned whether the *Terry* stop should be permitted for narcotic possession cases at all.⁴⁴ He also questioned the finding of probable cause to arrest in *Peters*, stating that he would have ruled that the officer had reasonable suspicion to stop but not to arrest.⁴⁵

Terry, *Sibron*, and *Peters* are the foundation on which the Court built the law controlling reasonable suspicion to stop a person suspected of criminal activity. Later cases gave the Court the opportunity to address problems relating to stop and frisk not foreseen in *Terry*.

1. The Expansion and Redefinition of *Terry*

*Adams v. Williams*⁴⁶ extends *Terry* to arrests for possessory offenses where the stop was based on an informer's tip. In doing so, the Court recognized for the first time that an officer could stop a suspect to investigate suspicious activities without reasonable cause to believe the defendant was armed and dangerous.

One Justice argued in dissent that the permissive *Terry* rules should not be applied to mere possessory offenses.⁴⁷ Another dissenter⁴⁸ argued that *Terry* was not intended to allow a policeman to stop and frisk a citizen based on a tip from an untrustworthy source which imparted a mere hunch that the suspect was engaged in criminal activity. Rather, the *Terry* search was intended to apply only where the officer observed, first hand, suspicious behavior which he could articulate later, in a court proceeding.

In *United States v. Brignoni-Ponce*,⁴⁹ decided three years later, the Court extended *Terry* to include stops for nonviolent offenses. The Court expressed its acceptance of brief detentions for investigative purposes in the narrow confines of a search by immigration agents for illegal aliens in the border area.⁵⁰

43. *Id.* at 66-67. One commentator argues that reasonable suspicion to stop would not have to be so coupled. *E.g.*, 3 W. LAFAYE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 9.3 at 75 n.99 (1978).

44. 392 U.S. 40, 74 (Harlan, J., concurring).

45. *Id.* at 74.

46. 407 U.S. 143 (1972). For a recent Colorado case which has some resemblance to *Adams*, see *People v. Villiard*, No. 835A597 (Colo. March 26, 1984).

47. *Id.* at 152 (Brennan, J., dissenting) (quoting *Adams v. Williams*, 436 F.2d 30, 38-39 (2d Cir. 1970) (Friendly, J., dissenting)). See also Note, *Investigative Stops in Urban Centers: Upholding the Constable's Whim*, 44 BROOKLYN L. REV. 963 (1978) (adopts the view that *Terry* only meant to apply the stop and frisk rationale in a setting involving the suspicion of potentially dangerous criminal activity).

48. 407 U.S. 143, 155 (Marshall, J., dissenting).

49. 422 U.S. 873 (1975).

50. *Id.* at 881.

The Supreme Court concluded that *Terry*, *Adams* and *Brignoni-Ponce* together establish the appropriate circumstances in which the fourth amendment permits a limited search or seizure on facts which would not constitute probable cause for arrest.⁵¹ In short, given the predicate circumstances the Court may approve stops based on no more than reasonable suspicion of criminal activity, even though the officer may not believe that the suspect is armed and dangerous.

2. Limiting Police Discretion

Contrary to the precedents established by *Terry* and its progeny the Supreme Court has recently attempted to curtail limited stops in which the police officer was unable to point to specific and articulable facts to justify the stop. This was made clear in *Delaware v. Prouse*,⁵² where the Court refused to condone the stopping of a motor vehicle based on the officer's inarticulate hunch that the vehicle was unregistered.⁵³ The Court expressed concern that such "standardless and uncontrolled discretion" is exactly what the fourth amendment was intended to prevent.⁵⁴ In its holding the Court left open to the states the prerogative to develop neutral criteria whereby traffic stops are not subject to the "unconstrained exercise of discretion."⁵⁵

Three months later, *Brown v. Texas*⁵⁶ found a Texas statute unconstitutional for the same reasons as in *Prouse*. The statute required a citizen to identify himself when requested to by the police.⁵⁷ The statute was held infirm because it permitted the police to stop suspects without cause and it gave too much discretion to the police. This created the risk of arbitrary and abusive police practices.⁵⁸

It is apparent from these decisions that the Court will not endorse unfettered discretion—the police must be able to articulate some reason for engaging in an "intermediate" *Terry* stop. As the permissive progeny of *Terry* indicate, this justification is minimal.

B. *Colorado's Answer to Terry v. Ohio: Stone v. People*

The Colorado courts, like the federal courts, hold that although warrantless searches and arrests are presumptively unreasonable,⁵⁹ the presence of exigent circumstances may eliminate the warrant requirement.⁶⁰ The burden of establishing exigent circumstances is on the prosecution,⁶¹ and the

51. *Id.* at 881.

52. 440 U.S. 648 (1979).

53. *Id.* at 661.

54. *Id.* at 663.

55. *Id.*

56. 443 U.S. 47 (1979).

57. *Id.* at 52.

58. *Id.*

59. *Chimel v. California*, 395 U.S. 752 (1969); *e.g.*, *People v. Gurule*, 196 Colo. 562, 593 P.2d 319 (1978); *People v. Vaughns*, 182 Colo. 328, 513 P.2d 196 (1973).

60. *Terry v. Ohio*, 392 U.S. 1, 20 (1968); *People v. Hoinville*, 191 Colo. 357, 553 P.2d 777 (1976).

61. *Vale v. Louisiana*, 399 U.S. 30 (1970); *People v. Boorem*, 184 Colo. 233, 519 P.2d 939 (1974); *People v. Moreno*, 176 Colo. 448, 491 P.2d 575 (1971).

court must view the totality of circumstances before making its ruling.⁶² Under Colorado case law, several factors are to be considered in determining whether exigent circumstances exist. These factors include whether immediate action is needed to protect public safety,⁶³ whether the police have probable cause to believe a violent crime has been committed and flight of the suspect is imminent,⁶⁴ or when it is likely that evidence will be destroyed.⁶⁵ Exigent circumstances exist when time is of the essence;⁶⁶ the degree of urgency involved and the amount of time necessary to obtain a warrant are crucial factors.⁶⁷

The Colorado legislature has codified the constitutional standards announced in *Terry*.⁶⁸ The statute requires the existence of three elements for a valid stop and frisk. The first requirement is that the stop be justified by some specific information that the person stopped was recently involved in a crime or that he is about to engage in a crime.⁶⁹

Once the citizen is stopped, a pat-down for weapons is permitted when the officer has a reasonable basis for suspecting that the person is armed.⁷⁰ This second element does not require absolute certainty, but merely that the officer point to specific and articulable facts that would warrant a reasonable and prudent person to believe that his or her safety or that of others was in danger.⁷¹ A third requirement for a stop and frisk is that a subsequent search be limited to the purpose of the stop in the first instance.⁷²

The leading case in Colorado for investigatory stops is *Stone v. People*.⁷³ This case sets forth the guidelines for lawful field investigations involving the temporary detention of citizens on less than probable cause. *Stone* permits a request for the suspect's identification and a demand for explanation of suspicious behavior. The court set forth three requirements for a valid "*Stone*" stop: first, the officer must have a reasonable suspicion that the person stopped has committed, or is about to commit a crime; second, the purpose of the detention must be reasonable; and finally, the nature of the detention must be reasonable in light of its purpose.⁷⁴

62. *United States v. Cortez*, 449 U.S. 411, 417-18 (1981); *DeLaCruz v. People*, 177 Colo. 46, 492 P.2d 627 (1972).

63. *People v. Cox*, 190 Colo. 326, 546 P.2d 956 (1976) (where the defendant drove at high speeds from the scene of a crime).

64. *Id.*

65. *United States v. Santana*, 427 U.S. 38, 43 (1976); *People v. Amato*, 193 Colo. 57, 562 P.2d 422 (1977); *People v. Mathis*, 189 Colo. 534, 542 P.2d 1296 (1975).

66. *People v. Cox*, 190 Colo. 326, 546 P.2d 956 (1976); *DeLaCruz v. People*, 177 Colo. 46, 492 P.2d 627 (1972).

67. *People v. Boorem*, 184 Colo. 233, 519 P.2d 939 (1974).

68. COLO. REV. STAT. § 16-3-103 (1973).

69. *E.g.*, *People v. Casias*, 193 Colo. 66, 563 P.2d 926 (1977).

70. *E.g.*, *People v. Sherman*, 197 Colo. 442, 593 P.2d 971 (1979).

71. *E.g.*, *People v. Taylor*, 190 Colo. 144, 544 P.2d 392 (1975) (stop and frisk was justified where defendant was seen in area of burglary and officers had seen the name of the defendant on police flyers describing him as armed and dangerous).

72. *E.g.*, *People v. Navran*, 174 Colo. 222, 483 P.2d 228 (1971) ("the right to stop and frisk is not an open invitation to conduct an unlimited search"). *Id.* at 232.

73. 174 Colo. 504, 485 P.2d 495 (1971).

74. 174 Colo. at 509, 485 P.2d at 497. Professor LaFave has noted that the reasonableness of any detention may depend on whether the police utilized an investigatory method designed to resolve the situation in a timely fashion.

The Colorado Supreme Court placed limits on the *Stone* stop in *People v. Gomez*.⁷⁵ In that case, the court held that an arrest which lacked probable cause could not later be justified as an investigatory stop. The *Stone* case was also limited in a later case⁷⁶ where a statute which gave an officer the authority to require the production of a driver's license did not give the officer authority to stop any car at his or her discretion.⁷⁷ The court reasoned that to allow this unchecked discretion by the police would countermand the intent of the stop and frisk statute.⁷⁸

IV. THE *PEOPLE V. THOMAS* DECISION

A. *The Facts*

On the morning of September 16, 1981, Denver narcotics officers Schuelke and Chavez were on routine patrol with two other officers in an unmarked police vehicle in a Black neighborhood known as Five Points. While stopped for a red light Officer Schuelke recognized the defendant Thomas standing across the street in the parking lot of a Church's Fried Chicken restaurant and alerted the other officers to Thomas' presence on the street.⁷⁹ According to Schuelke, Thomas was not moving in any direction; actually, he was "more or less just standing in the lot."⁸⁰ At that time, the officers did not have information which suggested any criminal involvement by Thomas.⁸¹

There was conflicting testimony regarding the exact sequence of events following Officer Schuelke's recognition of Thomas. Detective Chavez testified that when his eyes met the suspect's, he ran toward the "shack," an occasional gambling establishment. Later, the detective stated that he drove around the corner while the defendant walked toward the "shack." Subsequently, Thomas put his hand in his pocket, and began to run. The officers assumed that "at the time [the defendant] was either trying to hide something [or] had something on him," and pursued Thomas.⁸²

After stopping the car, the officers chased the defendant on foot into the "shack." Detective Schuelke saw the defendant throw something into a water pitcher on top of a vending machine.⁸³ Schuelke ordered Thomas to stop, pulled his gun, and retrieved six balloons containing cocaine from the water pitcher.⁸⁴

At trial, Thomas moved to suppress the balloons. The motion was granted and the district court held that the officers' chase was based on bare suspicion and that the defendant's act of discarding the balloons was the

75. 193 Colo. 208, 563 P.2d 952 (1977).

76. COLO. REV. STAT. § 42-2-133 (1973).

77. *People v. McPherson*, 191 Colo. 81, 550 P.2d 311 (1976); *Accord Delaware v. Prouse*, 440 U.S. 648 (1979).

78. *See* COLO. REV. STAT. § 16-3-103 (1973).

79. 660 P.2d 1272, 1273.

80. *Id.*

81. *Id.*

82. *Id.* at 1273-74.

83. *Id.* at 1274.

84. *Id.*

product of an illegal chase.⁸⁵ The People appealed to the Supreme Court of Colorado, which upheld the decision to suppress the cocaine. The Colorado Supreme Court held that the officers did not have reasonable suspicion of criminal activity when they began their pursuit of the defendant, and that the cocaine was a product of an illegal seizure of the defendant's person.⁸⁶

B. *The Holding: Illegal Investigative Stop*

In upholding the decision of the trial court, the Colorado Supreme Court found that the police had no reason to chase Thomas down the street.⁸⁷ Since the chase and the subsequent stop were unjustified, the defendant's subsequent act of abandonment was the result of an unlawful police intrusion,⁸⁸ and the evidence was inadmissible.⁸⁹

The court relied on *Terry*,⁹⁰ *People v. Tate*,⁹¹ and *Stone v. People*,⁹² to supply the objective test for justifying an investigative stop. Before seizing the citizen, the *Thomas*⁹³ court held that the officers must have: 1) a specific and articulable basis in fact for suspecting that criminal activity has occurred, is taking place, or is about to take place, 2) a reasonable purpose for the stop, and 3) a reasonable relationship between the purpose and character of the stop.⁹⁴

The *Thomas* stop was improper because it did not meet the first prong of this test. According to the court, the fact that Thomas made "furtive gestures" is laden with inherent ambiguity, and therefore cannot justify a stop in the absence of other facts indicating criminal activity.⁹⁵ *People v. Waits*⁹⁶ was expressly overruled, because, in that case, the suspects' furtive gestures in a high crime area were considered satisfactory grounds for reasonable suspicion to stop.⁹⁷

Focusing on the absence of specific and articulable facts supporting reasonable suspicion, the court held that "the balance between public interest and — defendant's — right to personal security and privacy tilts in favor of freedom from police interference."⁹⁸ The Court cited *Brown v. Texas*⁹⁹ in its discussion of the risk of intolerable, arbitrary, and abusive police practices inherent in chases based on subjective criteria or less than reasonable suspicion.¹⁰⁰

The court concluded that Thomas' efforts to avoid police contact were

85. *Id.*

86. *Id.*

87. *Id.* at 1274.

88. *Id.*

89. *Id.*

90. *Terry v. Ohio*, 392 U.S. 1 (1968).

91. 657 P.2d 955 (Colo. 1983).

92. 174 Colo. 504, 485 P.2d 495 (1971).

93. 660 P.2d at 1274.

94. *Id.* at 1275.

95. *Id.*

96. 196 Colo. 35, 580 P.2d 391 (1978).

97. 660 P.2d at 1276.

98. *Id.* at 1276-77.

99. 443 U.S. 47, 52 (1979).

100. 600 P.2d at 1277.

not illegal and were not grounds to suspect criminal activity. While *Waits* held that flight was cause to reasonably suspect someone of criminal behavior,¹⁰¹ the Colorado court followed the approach taken in a number of other jurisdictions that such flight is not a "specific and articulable fact" which could support a stop.¹⁰²

C. *The Dissent: A Restatement*

In their dissenting opinion, Justice Rovira and Chief Justice Hodges restated the issue: did the defendant's flight upon seeing the officers, his putting his hand in his pocket as he was running, the fact that this happened in a high-crime area, and the knowledge and experience of the officers who recognized the defendant create a reasonable suspicion of criminal activity?¹⁰³ Although the Justices supported the objective test employed by the majority, they disagreed with the reasoning and the conclusion.¹⁰⁴

The majority was criticized for allegedly misinterpreting *Sibron v. New York*.¹⁰⁵ The dissent argued that the factors in *Sibron* were merely guidelines, not mandatory considerations. Additionally, the dissent pointed to a proposition made by the majority as to what is needed for a valid investigative stop. The dissent notes that the *Sibron* Court was discussing what constituted probable cause for an arrest and not probable cause for an investigatory stop.¹⁰⁶

The dissenters contended that under the facts in *Thomas*, the officers had specific and articulated facts to support their decision,¹⁰⁷ and that there was virtually no risk of arbitrary and abusive police practice.¹⁰⁸ The dissent stressed that the question of what amounts to reasonable suspicion is a common sense question.¹⁰⁹ In this case, according to the dissent, immediate police action was required, and courts should ask for a lesser degree of objectively articulable evidence, as opposed to instances where there is more time for consideration of alternative courses of action.¹¹⁰

The justices lamented the loss of the *Waits* standard which had allowed police to make "reasonable inferences" based on their experience in law enforcement.¹¹¹ The heart of the dissent clings to the belief that deliberately furtive actions and flight at the approach of a police officer is an obvious attempt to avoid contact with the officer. The implication to be drawn from sudden change in course is that the defendant had engaged in criminal activity and wished to avoid detection.¹¹²

101. 580 P.2d at 393.

102. See 660 P.2d at 1275-76 and cases cited therein.

103. *Id.* at 1277.

104. *Id.* at 1277-78.

105. 392 U.S. 40 (1968). See *supra* note 34 and accompanying text.

106. 660 P.2d at 1278.

107. *Id.* at 1278-79.

108. *Id.*

109. *Id.* at 1279.

110. *Id.*

111. *Id.* at 1278.

112. *Id.*

V. ANALYSIS

A. *Attempting to Define Reasonable Suspicion*

The reasonable suspicion of criminal activity standard, used for investigatory stops can be defined by comparison to the arrest standard. The only difference between reasonable suspicion to stop, and probable cause to arrest, is that the latter requires a greater quantum of evidence.

The "reasonable suspicion to stop" standard is generally thought to be a level of suspicion greater than a mere hunch, but less than the probable cause required for an arrest.¹¹³ A police officer's observation of the appearance of a suspect, his or her conduct, and the location of the activity all contribute to a finding of "reasonable suspicion to stop."

Reasonable suspicion to stop is reviewed on an ad hoc basis,¹¹⁴ by assessing the totality of circumstances¹¹⁵ in determining whether it was reasonable to suspect that the person stopped was engaged in criminal activity. Similarly, probable cause to arrest tests the officer's ability "to point to specific and articulable facts, which, taken together with rational inferences from these facts, reasonably warrant intrusion."¹¹⁶

The definition of "probable cause" has probably caused more confusion than any other aspect of search and seizure law. More often than not, it is the presence or absence of probable cause that will determine the constitutionality of a search or seizure. Unfortunately, the Supreme Court has allowed the required degree of probable cause to fluctuate with the particular facts of each case.¹¹⁷ Professor Amsterdam once wryly noted that recognition of a sliding scale of probable cause would produce more slide than scale.¹¹⁸

B. *The Sliding-Scale Approach*

Against the backdrop of the Supreme Court decisions regarding fluctuating probable cause standards, a sliding-scale approach has been applied by various courts, including the Colorado Supreme Court. Significant factors used in their determinations have included:¹¹⁹

1. Personal Knowledge and Experience of the Officer

In *Terry v. Ohio*, the Court recognized that the officer's experience allows him or her to view the facts as a meaningful whole demonstrating reasonable suspicion of criminal activity.¹²⁰ Other courts have held that the officer's knowledge of the suspect is an important factor.¹²¹ The discretion of the

113. Cf. *People v. Branin*, 188 Colo. 235, 533 P.2d 1138 (1975).

114. See *People v. Casias*, 193 Colo. 66, 563 P.2d 926 (1977).

115. See *United States v. Cortez*, 449 U.S. 411 (1981).

116. 392 U.S. at 21.

117. Bacigal, *supra* note 4 at 765.

118. *Id.* at 786.

119. See Bell, *Factors Which Justify a Stop and Frisk*, 6.6. SEARCH & SEIZURE L. REV. 1 (1979).

120. 392 U.S. 1 at 21 (1968).

121. *United States v. Worthington*, 544 F.2d 1275 (5th Cir. 1977), *cert. denied*, 434 U.S. 817 (1977); *People v. Ressin*, 620 P.2d 717 (Colo. 1980).

officer is limited, however, and reliance on mere hunches is considered insufficient for reasonable suspicion.¹²²

2. Furtive Gestures

The courts have been inconsistent in their definition of "furtive gesture," calling it any conduct which an experienced officer considers suspicious.¹²³ Because such a gesture is often innocent movement on the part of the suspect, however,¹²⁴ it is not grounds for reasonable suspicion in the absence of additional facts.¹²⁵ Nervousness, excitement, or abrupt movement is generally considered a natural response to confrontation with an officer of the law.¹²⁶

3. Flight of the Suspect

Flight poses similar problems in that motive is difficult, if not impossible, to ascertain.¹²⁷ Some courts have found that simply running in the opposite direction from an officer or turning around in the vicinity of an officer is entirely consistent with innocent behavior.¹²⁸ Other courts, however, have held that "flight invites pursuit and colors conduct which hitherto has appeared innocent."¹²⁹ The Colorado Supreme Court held in *Waits* that flight alone may be sufficient grounds for reasonable suspicion when the flight appears to be a direct response to the suspect seeing the officer.¹³⁰

4. Suspicious Conduct

Suspicious conduct, like furtive gestures, must be considered in light of the surrounding circumstances¹³¹ and interpreted by an experienced officer.¹³² Again, court rulings have been contradictory and confusing. In *Terry*, the defendants were observed by undercover officers as they conferred, proceeded alternatively back and forth along an identical route, and paused to stare in the same store window approximately twenty-four times.¹³³ In light of the officers' experience, the suspicious conduct was grounds for reasonable cause.¹³⁴ In *Cooper v. United States*,¹³⁵ police were held to have reasonable suspicion to stop a man carrying two color television sets in a high

122. *In re Tony C.*, 21 Cal. 3d 888, 582 P.2d 957, 148 Cal. Rptr. 366 (1978); *People v. Goessel*, 186 Colo. 208, 526 P.2d 664, 665 (1974).

123. *See Bell*, *supra* note 119, at 3. *See also* 660 P.2d at 1275-76, and cases cited therein.

124. *Yolo County*, 3 Cal. 3d at 818, 478 P.2d at 455; *Goessel*, 186 Colo. 208, 526 P.2d 664.

125. *Sibron*, 392 U.S. at 64; *People v. McPherson*, 191 Colo. 81, 550 P.2d 311 (1976).

126. *Goessel*, 186 Colo. 208, 526 P.2d 665 (1974).

127. *Yolo County*, 3 Cal. 3d 807, 818, 478 P.2d 449, 455, *quoting* *People v. Weitzer*, 269 Cal. App. 2d 274, 292, 75 Cal. Rptr. 318, 330 (1969).

128. *McClain v. State*, 408 So. 2d 721, 722 (Fla. App. 1982).

129. *United States v. Pope*, 561 F.2d 663, 668 (6th Cir. 1977).

130. 196 Colo. 35, 38-39, 580 P.2d 391, 393-94 (1978).

131. *Commonwealth v. Thibeau*, 429 N.E.2d 1009, 1010 (Mass. 1981).

132. *Terry*, 392 U.S. 1, 23 (1968); *Davis v. United States*, 409 F.2d 458 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 949 (1969).

133. 392 U.S. 1, 6 (1968).

134. *Id.* at 21-22.

135. 368 A.2d 554 (D.C. 1977).

crime neighborhood,¹³⁶ whereas stopping a man with a television set at a bustop was found unreasonable in *People v. Quintero*.¹³⁷

5. Similarity to Description of Wanted Persons

Generally, similarity to a description of a person or vehicle is probable cause for further investigation.¹³⁸ It is necessary, though, for the description to be specific,¹³⁹ unless other factors are present, e.g., presence in an isolated location late at night.

6. Time and Place of Stop

Location and hour, if coupled with other factors, may give sufficient color to a suspect's conduct to justify further investigation.¹⁴⁰ Rarely, however, is time and place alone sufficient cause.¹⁴¹

7. High Crime Areas

Many courts have found that this factor may color conduct which otherwise might not reasonably arouse suspicion.¹⁴² Other courts, however, warn against the ease with which abuse may occur, and discourage use of this factor.¹⁴³

8. Nearness to the Scene of the Crime

Spatial and temporal proximity of a suspect to the scene of a reported crime is often a relevant factor in determining probable cause.¹⁴⁴ This does not justify dragnet-type stops in which any pedestrian is subject to a roving police interrogation.¹⁴⁵ In Colorado, mere presence at the scene of a crime does not constitute probable cause for arrest.¹⁴⁶

9. Evidence in Plain View

Under the plain view doctrine,¹⁴⁷ evidence in plain view may be relied on to establish probable cause.¹⁴⁸ This doctrine is limited in that 1) there must be a valid intrusion, 2) there must be an inadvertent discovery, 3) the

136. *Id.* at 557.

137. 657 P.2d 948 (Colo. 1983).

138. *United States v. Gaines*, 563 F.2d 1352, 1357 (9th Cir. 1977); *People v. Shackelford*, 37 Colo. App. 317, 546 P.2d 964 (1976).

139. *In re Tony C.*, 21 Cal. 3d 888, 582 P.2d 957, 148 Cal. Rptr. 366 (1978).

140. *People v. Damaska*, 404 Mich. 391, 273 N.W.2d 58 (1978).

141. *Scott v. State*, 549 S.W.2d 170 (Tex. 1976).

142. *United States v. Garr*, 461 F.2d 487 (5th Cir. 1972), *cert. denied*, 409 U.S. 880 (1972); *People v. Taylor*, 190 Colo. 144, 544 P.2d 392 (1975).

143. *In re Tony C.*, 21 Cal. 3d 888, 582 P.2d 957, 148 Cal. Rptr. 366 (1978); *People v. Marquez*, 183 Colo. 231, 516 P.2d 1134 (1973).

144. *Bell*, *supra* note 119, at 1, *citing United States v. Wright*, 565 F.2d 486 (8th Cir. 1977), *cert. denied*, 435 U.S. 974 (1978); *People v. Taylor*, 190 Colo. 144, 544 P.2d 392 (1975).

145. *In re Tony C.*, 21 Cal. 3d 888, 582 P.2d 957, 148 Cal. Rptr. 366 (1978).

146. *People v. Branin*, 188 Colo. 235, 533 P.2d 1138 (1975); *People v. Felch*, 174 Colo. 383, 483 P.2d 1335 (1971).

147. The plain view doctrine was fully developed for the first time in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

148. *Id.* at 455-56; *People v. McGahey*, 179 Colo. 401, 500 P.2d 977 (1972).

officer must immediately recognize that what has been discovered is evidence of wrongdoing and must have reason to believe that the item seized is contraband before he or she may seize what is plainly seen.¹⁴⁹ Inherent in the plain view doctrine is the principle that the object seized must not have been put in plain view as a result of unlawful police conduct.¹⁵⁰

In *Thomas*, the court discusses several of these criteria, holding that the combination of factors present were insufficient to support a police stop. The dissent reached an opposite result concluding that the factors present indeed justified the stop. Although it is rare that a stop will be justified on the presence of a single suspicious factor, it is similarly rare that only a single factor will appear in a given situation.¹⁵¹ As the decisions illustrate, not only does each case depend on its peculiar set of factors, but courts often interpret the same factors differently, with different courts giving different meaning to what constitutes probable cause or reasonable suspicion.¹⁵² This complexity is exacerbated when one considers that state and federal standards of probable cause and reasonable suspicion can and do, vary.

C. *Independent and Adequate State Grounds: The New Complexity*

The Colorado Constitution has a provision to protect state citizens from unlawful search and seizure, which is essentially identical to the fourth amendment.¹⁵³ The Colorado Supreme Court may interpret the Colorado Constitution as guaranteeing Colorado citizens more protection than is given by similar federal provisions,¹⁵⁴ but it cannot interpret the United States Constitution as providing greater safeguards than those delineated by the federal courts.

The dissent in *Thomas* argued that the court was establishing a per se rule which made it unreasonable for the police to suspect a citizen of a crime for mere avoidance of police contact.¹⁵⁵ This may well be true. The holding in *Thomas* could give more protection to a state citizen than required by *Terry* and subsequent federal decisions. Thus, the United States Supreme Court is without jurisdiction to reverse the state decision.¹⁵⁶ The state courts can, and are, expanding their own constitutional provisions to provide greater protection for their citizens.¹⁵⁷

It is probably more than a mere coincidence that the justice writing for

149. 403 U.S. at 468-71.

150. *Commonwealth v. Jeffries*, 454 Pa. at 324, 326, 311 A.2d at 918, 916.

151. *Bell*, *supra* note 119, at 1.

152. *Id.*

153. *See* COLO. CONST. art. II, § 7.

154. *Oregon v. Hass*, 420 U.S. 714, 719 (1975) ("[A] state is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards.") (emphasis in original); *Cooper v. California*, 386 U.S. 58, 62 (1967).

155. 660 P.2d 1272, 1278.

156. *See* Brennan, *supra* note 39, at 501 n.80.

157. *Id.* at 495. As Justice Brennan notes, states are construing identical state constitutional provisions to provide greater protection than required by the federal provisions; *See also Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1370 (1982) (examines the trend of states to use their own constitutions in the criminal procedure area).

the majority in *Thomas* had expressed in an earlier case that the Colorado Constitution was superior protection for the right of privacy than its federal counterpart.¹⁵⁸ Even if the dissent is correct in holding that the fourth amendment does not dictate the result in *Thomas*, it is clear that the decision is justifiable under the state constitutional counterpart.

VI. TWO ALTERNATIVES TO THE CASE-BY-CASE ANALYSIS IN NARCOTIC CASES: THE "ALL" OR "NOTHING" APPROACHES

It is evident from *People v. Thomas* that the police do not have an easy task in determining reasonable suspicion for an investigatory stop, especially in narcotics cases. A fresh approach to the problem of pretext searches for drugs in stop and frisk encounters is sorely needed. The present case-by-case method should not be used for possessory offenses; rather Colorado should adopt the "all or nothing" approach in combating drug related offenses. The stop and frisk situation would then be limited to crimes threatening life or property. In light of the courts' inability to agree upon a definition of reasonable suspicion, it is unrealistic to expect a police officer, who is understandably unaware of the fine nuances of the search and seizure laws to operate in this area. The purpose of this section is to explore two alternatives to the case-by-case analysis used to decide stop and frisk cases involving narcotic offenses.

The two approaches, or a combination thereof, could be strictly limited to narcotic possession offenses. The advantages of both approaches are essentially the same: establishing clear guidelines for police conduct and reducing resentment against the police.

A. The "All" Approach

The "all" approach represents the idea that the police cannot effectively combat crime involving narcotics by use of the reasonable suspicion standard. The courts frequently exclude evidence because the stop was arbitrary. The "all" approach would alleviate this problem. This approach, as discussed by Professor LaFave, would permit the police to stop suspected narcotic possessors for interrogation without the same quantum of suspicion required by *Terry*.¹⁵⁹ This is premised on the fact that the stop was "pursuant to a plan embodying explicit neutral limitation."¹⁶⁰ Professor LaFave noted two other Supreme Court cases which the Colorado court relied on to

158. Justice Quinn Stated:

I believe that Article II, Section 7, of the Colorado Constitution contemplated greater protection for privacy interests than is presently available under Fourth Amendment doctrine. We have recognized on other occasions that decisions of the United States Supreme Court, while entitled to respectful considerations, are not controlling on the issue of constitutional protections emanating from identical or similar provisions in the Colorado Constitution.

People v. Spies, 615 P.2d 710, 718 (Colo. 1980). (Quinn, J., dissenting).

159. *Brown v. Texas*, 443 U.S. 47, 51 (1979); *See, e.g.*, 3 W. LAFAVE, *supra* note 43, § 9.3(g) (Supp. 1983).

160. 3 LAFAVE, *supra* note 43, at 42-43.

support this proposition.¹⁶¹ He suggests that the Court might approve of a neutral plan under the *Camara v. Municipal Court*¹⁶² balancing test if the police could demonstrate a particular enforcement problem.¹⁶³

The advantage to this approach is that the police would not need individualized suspicion, as in *Thomas*, if they operated under a tightly and carefully designed plan to limit police discretion. As LaFave noted, the Court may rule negatively if confronted with a neutral plan to question persons in an area known for drug users, but a tight and strictly designed plan might pass muster.¹⁶⁴

The most likely type of situation where a neutral plan would be approved by the Court, according to LaFave, is where the plan is used to combat a "special problem" existing at a given time and place, such as a neighborhood drug market.¹⁶⁵

B. *The "Nothing" Approach*

This approach would eliminate an officer's authority to stop a citizen for a suspected possessory offense. This was the approach taken by the American Law Institute in drafting its model stop and frisk statute.¹⁶⁶ Police officers would only be authorized to stop a person suspected of violent, or property crimes.

The Model Code of Pre-Arrestment Procedure cites two reasons why narcotic offenses were not included in the stop and frisk statute. First, use of the stop and frisk in narcotic stops creates an obvious temptation to abuse the limited search for weapons as a pretext to search for drugs. Second, the need for stop and frisk as an enforcement tool for narcotic investigators is not as great as other types of crimes.¹⁶⁷ The vice officers tend to rely more on informers and undercover agents to apprehend drug offenders than on the stop and frisk method.¹⁶⁸ This is also apparently the case with the Denver Police Department.¹⁶⁹

This "nothing" approach reverts back to the original intent of *Terry v. Ohio*: that the stop and frisk should only be used when the person stopped is believed to be armed and dangerous.¹⁷⁰

161. *Delaware v. Prouse*, 440 U.S. 648 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

162. 387 U.S. 523 (1967). See also *supra* note 27 and accompanying text.

163. 3 W. LAFAVE, *supra* note 43 § 9.3(g), at 44-45 (Supp. 1983).

164. *Id.* at 44.

165. *Id.* at 45. Professor LaFave gives three cases as examples where such a plan could be utilized: 1) a problem with vandalism; 2) an area of numerous auto thefts; 3) situation involving special responses, i.e., preventing racial incidents.

166. See MODEL CODE OF PRE-ARRESTMENT PROCEDURE § 110.2 (Official Draft 1975).

167. *Id.* § 110.2 commentary at 278-79.

168. *Id.* at 279.

169. Interview with Detective Sgt. Costigan, Vice and Narcotic Bureau, Denver Police Department, in Denver (Aug. 3, 1983) (stated that over half the arrests initiated by the bureau are by warrant, more than any other bureau in the department). [hereinafter cited as Interview].

170. See *supra* note 47 and accompanying text.

C. Possible Benefits of Either Approach

The adoption of either approach would result in immediate benefits. The "all" approach would encourage development of clear guidelines for the officer on the street. This "neutral" plan would also insure the equal treatment of citizens by reducing the influence of bias and providing uniform standards and control of police conduct.¹⁷¹

The "nothing" approach, on the other hand, would help to eliminate abuse of the stop and frisk as a pretext to search for drugs. This, in turn, could result in better relations between citizens and the police.¹⁷²

Both of these approaches could be used simultaneously by amending the Colorado stop and frisk law¹⁷³ to exclude stops for suspicion of a possessory offense, and developing a "designed stop" plan subject to neutral and fixed standards to be used in special cases should the need arise. A change in the existing law that would enable police officers to work effectively while simultaneously eliminating the abuse of the stop and frisk is long overdue.¹⁷⁴

VII. CONCLUSION

It is essential that both the criminally accused and the police know what is expected of them; behavior constituting "good police work" one day should not be grounds for reprimand or dismissal the next. The judiciary's use of individualized inquiry rather than objective standard has perpetuated confusion in this area.

People v. Thomas represents an attempt to refine the definition of reasonable suspicion in stop and frisk encounters. This attempt to clarify an objective standard for search and seizure does not alleviate problems inherent in practical application. Implementation of either the "all" or "nothing" approach would help to eliminate arbitrary police behavior which results in the suppression of otherwise admissible evidence.

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171. 3 W. LAFAYE, *supra* note 43, § 9.3(g) at 44 (Supp. 1983).

172. See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, 157-68 (1968).

173. COLO. REV. STAT. § 16-3-103 (1973).

174. See generally D. BAYLEY & H. MENDELSON, MINORITIES AND THE POLICE: CONFRONTATION IN AMERICA (1968) (a survey of the relationship between the Denver Police and Minorities); Interview, *supra* note 169. (When Detective Costigan was asked whether *Thomas* would affect stop and frisk cases he replied that it probably would affect convictions, but not stops. The department still wants officers to stop even if it means no convictions. In fact, Detective Costigan, before this interview, had never heard of the holding in *Thomas* although he personally knew the defendant as a career criminal, with many past convictions for drug related offenses. When asked if the ruling in *Thomas* might encourage perjury by the police he answered in the affirmative.)

