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Recent Developments: McDowell v. State: Absent Probable Cause, for a Search of a Container to Be Constitutional, a Police Officer Must Articulate a Reasonable Suspicion That the Container Holds a Weapon and Why a Terry-Type Pat-down of the Container Would Be Insufficient to Determine Whether There Are Weapons in the Container

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RECENT DEVELOPMENT

MCDOWELL v. STATE: ABSENT PROBABLE CAUSE, FOR A SEARCH OF A CONTAINER TO BE CONSTITUTIONAL, A POLICE OFFICER MUST ARTICULATE A REASONABLE SUSPICION THAT THE CONTAINER HOLDS A WEAPON AND WHY A *TERRY*-TYPE PAT-DOWN OF THE CONTAINER WOULD BE INSUFFICIENT TO DETERMINE WHETHER THERE ARE WEAPONS IN THE CONTAINER.

By: Matthew Powell

The Court of Appeals of Maryland held that a police officer conducting a search of a container must articulate reasonable suspicion that the container holds a weapon. *McDowell v. State*, 407 Md. 327, 965 A.2d 877 (2009). Moreover, the court held that the police officer must state why a *Terry*-type pat-down of the container would be insufficient to confirm or dispel the suspicion. *Id.* at 330, 965 A.2d at 879. If the police officer does not meet the two requirements, the search violates the Fourth Amendment of the United States Constitution. *Id.* at 332, 965 A.2d at 880.

Trooper Gussoni ("Gussoni") stopped a vehicle around midnight after observing the vehicle weave between lanes. Ernest McDowell ("McDowell"), the owner of the vehicle, sat in the passenger seat. Gussoni observed that both McDowell and the driver seemed nervous and "appeared to be out of it." While checking the status of the driver's license and vehicle registration, Gussoni saw McDowell reach underneath his seat. Gussoni approached the vehicle and saw McDowell reach toward a gym bag large enough to hold a weapon. Gussoni ordered McDowell to exit the vehicle and bring the gym bag with him. Once McDowell exited the vehicle, Gussoni ordered McDowell to open the gym bag, which contained a plastic bag holding a white powdery substance. Gussoni confiscated the gym bag and arrested McDowell. A further search conducted at the police station uncovered 55.5 grams of heroin in the gym bag.

Subsequent to his arrest, McDowell was charged in the Circuit Court for Queen Anne's County with several drug-related offenses. McDowell moved to suppress the evidence seized from the gym bag.

After a hearing, the circuit court denied the motion to suppress based on its finding that Gussoni's search of the gym bag was permissible. On an agreed statement of facts, the court found McDowell guilty of importing a controlled dangerous substance into the state and sentenced him to twenty years imprisonment. McDowell timely noted an appeal on the ground that Gussoni did not have a reasonable articulable suspicion to believe that McDowell was armed and dangerous. The Court of Special Appeals of Maryland affirmed the circuit court's decision, and the Court of Appeals of Maryland granted McDowell's petition for a writ of certiorari.

In reviewing the permissibility of Gussoni's search, the court relied on *Terry v. Ohio* and its progeny. *McDowell*, 407 Md. at 332, 965 A.2d at 880 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). *Terry* established a police officer's limited right to stop and frisk a person for weapons when the officer has a reasonable suspicion that criminal activity is occurring and that the person engaged in such activity may be armed and dangerous. *Id.* at 332-35, 965 A.2d at 880-81 (citing *Terry*, 392 U.S. at 23-29). As noted in *Terry*, however, a stop and frisk is limited to a "pat-down of the suspect['s] outer clothing" for the limited purpose of determining whether the suspect is armed. *Id.* at 334-35, 965 A.2d at 881 (citing *Terry*, 392 U.S. at 21). Moreover, the *Terry* court noted that a police officer must have a reasonable suspicion based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." *Id.* at 334, 965 A.2d at 881 (quoting *Terry*, 392 U.S at 21).

The court further noted that, in *Michigan v. Long*, the Supreme Court extended the *Terry* doctrine to the interior of vehicles to address the especially dangerous situations that can arise between suspects and police officers during vehicular stops. *Id.* at 335-36, 965 A.2d at 881-82 (citing *Michigan v. Long*, 463 U.S. 1032, 1049 (1983)). The Supreme Court reasoned that a *Terry*-like protective search for weapons in the interior of a vehicle without probable cause, did not violate the Fourth Amendment. *Id.* at 336, 965 A.2d at 882 (citing *Long*, 463 U.S. at 1049). Thus, if the police officer discovers incriminating evidence during the course of a *Terry* stop, that evidence is admissible against the suspect so long as the officer complies with the dictates of *Terry*. *McDowell*, 407 Md. at 336, 965 A.2d at 882 (citing *Long*, 463 U.S. at 1050).

Although McDowell conceded that the traffic stop was lawful and that Gussoni was authorized to order him out of the vehicle, McDowell claimed that Gussoni did not have a reasonable articulable

suspicion that McDowell was armed or had weapons in his bag. *Id.* at 336-37, 965 A.2d at 882. Furthermore, McDowell argued that Gussoni's actions were based solely on his nervous appearance, which was not sufficient to suggest criminal activity. *Id.* (citing *Ferris v. State*, 355 Md. 356, 389, 735 A.2d 491, 509 (1999)).

In determining whether Gussoni possessed a reasonable suspicion that the bag contained a weapon, the court applied a "totality of the circumstances" standard. *Id.* at 337, 965 A.2d at 882 (quoting *United States v. Sokolow*, 490 U.S. 1, 8 (1989)). The court concluded that Gussoni was potentially facing two armed men, alone, without immediate backup. *Id.* at 337-38, 965 A.2d at 883. In light of the situation, and the bag being large enough to contain a weapon, the court held that Gussoni was justified in examining the bag. *Id.* at 338, 965 A.2d at 883 (citing *Matoumba v. State*, 162 Md. App. 39, 873 A.2d 386 (2005)).

Next, the court determined whether Gussoni was justified in demanding that McDowell open the bag without first articulating why a pat-down of the bag would have been insufficient in discovering the presence of a weapon. *McDowell*, 407 Md. at 338, 965 A.2d at 883. Acknowledging that this was an issue of first impression yet to be addressed by the Supreme Court, the court considered authority from the federal circuits. *Id.* The Court of Appeals for the Ninth Circuit held that a police officer conducting a *Terry* stop had no reason to open a briefcase that was soft and thin enough that, by feeling it, any weapon could have been detected. *Id.* at 339, 965 A.2d at 883-84 (quoting *United States v. Vaughn*, 718 F.2d 332, 335 (9th Cir. 1983)). Conversely, the Eighth Circuit, in a situation similar to that presented in *McDowell* and *Vaughn*, held that a "pat-down was not a necessary precursor under *Terry* before opening and searching a pouch" found in a properly stopped vehicle. *Id.* at 339, 965 A.2d at 884 (citing *United States v. Shranklen*, 315 F.3d 959 (8th Cir. 2003)).

The Court of Appeals of Maryland did not find the Eighth Circuit's reasoning persuasive. *Id.* at 340, 965 A.2d at 884. Rather, the court found that the Eighth Circuit speculated instead of ruling on the evidence presented. *Id.* The court agreed with the Ninth Circuit's rationale, however, noting that *Terry* only permitted measures necessary to determine whether the person was armed. *McDowell*, 407 Md. at 340, 965 A.2d at 884. These measures must be limited in scope to an intrusion reasonably designed to discover weapons that could threaten the police officer. *Id.* (citing *Terry*, 392 U.S. at 29).

The court refused to speculate as to whether a pat-down of the bag would have been adequate in this situation. *Id.* at 341-42, 965 A.2d at

885. Thus, the court held that Gussoni was not justified in requiring McDowell to open the bag without articulating why a *Terry*-like pat-down of the exterior of the bag would have been insufficient to determine whether the bag contained a weapon. *Id.* Accordingly, the court held that the trial court should have granted McDowell's motion to suppress. *Id.* at 342, 965 A.2d at 885.

In *McDowell v. State*, the Court of Appeals of Maryland extended the dictates of *Terry* to containers. In doing so, the court determined that, to search a container during a *Terry* stop, police officers must state a reasonable and articulable basis for why a pat-down of the container would be insufficient to confirm or dispel the suspicion that the container held a weapon. As a result, *McDowell* requires police officers, prosecutors, and defense attorneys to be particularly attentive to the factual circumstances surrounding a *Terry* stop and any subsequent container searches. If a police officer obtains evidence from a container without meeting the requirements set forth in *McDowell*, any seized evidence will likely be suppressed as a violation of the Fourth Amendment.