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# Recent Developments: Reid v. State: The Use of a Taser in Dart Mode Subjects an Individual to the Custody and Control of Police, Thus Raising an Investigatory Stop to a De Facto Arrest Requiring Probable Cause; Without Probable Cause, Statements and Evidence Obtained after a De Facto Arrest Are Inadmissible

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## RECENT DEVELOPMENT

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***REID V. STATE: THE USE OF A TASER IN DART MODE SUBJECTS AN INDIVIDUAL TO THE CUSTODY AND CONTROL OF POLICE, THUS RAISING AN INVESTIGATORY STOP TO A DE FACTO ARREST REQUIRING PROBABLE CAUSE; WITHOUT PROBABLE CAUSE, STATEMENTS AND EVIDENCE OBTAINED AFTER A DE FACTO ARREST ARE INADMISSIBLE.***

**By: Megan K. Green**

The Court of Appeals of Maryland held that the use of a taser in dart mode converted a *Terry* stop into a *de facto* arrest, as once the dart penetrated the skin, the individual was under the custody and control of the officer. *Reid v. State*, 428 Md. 289, 51 A.3d 597 (2012). The court further held that neither the public safety exception to *Miranda* nor the inevitable discovery doctrine applied to the seized gun or statements made by the defendant. Because all evidence flowed from an illegal arrest where probable cause was required, yet only articulable suspicion was present, such evidence was inadmissible. *Id.* at 309, 51 A.3d at 609.

Law enforcement officers received a tip from an informant who notified them that a tall, black male was armed and selling drugs at a public parking lot in Baltimore City. Officers responded and observed an individual, later identified as David Reid ("Reid"), who met the description provided by the informant. As the uniformed officers approached, Reid engaged in a maneuver known as "blading," where an armed individual turns away from the police to check and conceal the waistband area where a gun would be located. As officers neared Reid, he fled. Officers called out for Reid to stop, and when he failed to do so, a detective shot two metal darts from his taser at Reid, which penetrated his skin. Once apprehended, the detective asked Reid if he had anything illegal on him, and Reid responded that he had a gun in his pocket. Law enforcement officers searched Reid and seized a gun from his person.

Prior to trial, Reid moved to suppress statements made to police regarding the gun and the gun itself. The Circuit Court for Baltimore City denied the motion, finding that the law enforcement officers had effectuated a proper *Terry* stop. The circuit court noted that law enforcement officers may use reasonable force to effectuate a *Terry* stop, and the use of the taser in dart mode was an appropriate quantum of force given the circumstances. Ultimately, Reid was convicted of wearing, carrying, or transporting a handgun illegally, and of being in possession of a handgun after conviction of a disqualifying offense. Reid appealed

to the Court of Special Appeals of Maryland, however, the Court of Appeals of Maryland granted certiorari on its own initiative.

Recognizing this as a case of first impression, and in light of the development of new technology, the Court of Appeals of Maryland analyzed the Fourth Amendment in a new context. *Reid*, 428 Md. at 291, 51 A.3d at 591. In the landmark case *Terry v. Ohio*, the Supreme Court held that a law enforcement officer may stop an individual if the officer has an articulable suspicion that criminal activity is afoot, and may further frisk the individual for weapons if the officer has an articulable suspicion that the individual is armed and dangerous. *Id.* at 297, 51 A.3d at 602 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). However, if a *Terry* stop is deemed to have risen to the level of a *de facto* arrest, probable cause must have existed for the arrest to be valid. *Reid*, 428 Md. at 305, 51 A.3d at 607.

The court first addressed whether the use of a taser in dart mode is analogous to a "hard take down," which had been previously deemed a reasonable level of force in effectuating a *Terry* stop. *Reid*, 428 Md. at 297, 51 A.3d at 602. The Supreme Court has expressly held that threatening a suspect with force is permissible during a *Terry* stop if the officer believes the suspect to be armed and dangerous. *Id.* at 299, 51 A.3d at 603 (citing *United States v. Hensley*, 469 U.S. 221 (1985)). In fact, the Court of Appeals of Maryland held that drawing weapons is reasonable during a *Terry* stop when the suspect is believed to be armed. *Reid*, 428 Md. at 298, 51 A.3d at 602 (citing *In re David S.*, 367 Md. 523, 789 A.2d 607 (2002)). However, the court found the instant case distinguishable, considering the difference in modalities of force, and shifted its focus toward the point in which Reid's detention escalated from a *Terry* stop to a *de facto* arrest. *Reid*, 428 Md. at 302, 51 A.3d at 605.

The court explained that a formal arrest occurs when a law enforcement officer informs a suspect that he or she is under arrest. *Reid*, 428 Md. at 299-300, 51 A.3d at 603. In contrast, a *de facto* arrest occurs when the circumstances surrounding the detention are such that a reasonable person would not feel free to end the encounter. *Id.* Relying on case law, the court analyzed the circumstances that elevate a *Terry* stop to a *de facto* arrest. *Id.* at 302, 51 A.3d at 604.

In *Bailey v. State*, law enforcement officers detected a strong scent of marijuana, immediately grabbed the suspect, put his hands over his head, and searched him. *Reid*, 428 Md. at 300, 51 A.3d at 604 (citing *Bailey v. State*, 412 Md. 349, 987 A.2d 72 (2010)). The court held that because law enforcement officers acted with actual authority and physically seized the suspect, the level of intrusion raised the stop to a *de facto* arrest. *Id.* at 300-01, 51 A.3d at 604.

The court then applied its understanding of a *de facto* arrest to the circumstances surrounding Reid's detention. *Reid*, 428 Md. at 305, 51 A.3d at 606. Because a medical technician was needed to remove the darts from Reid's skin, the court determined that he was subjected to the custody and control of the police and under a *de facto* arrest as soon as the darts penetrated his skin. *Id.* at 302, 51 A.3d at 604-05. Based on the circumstances, a reasonable person in Reid's position would not have felt free to end the encounter. *Id.* at 305, 51 A.3d at 606. Furthermore, the need for medical assistance extended the stop to an indefinite duration and was therefore distinguishable from a hard take down. *Id.* at 302, 51 A.3d at 605.

Ultimately, because Reid was under the custody and control of officers, the Court of Appeals of Maryland determined that he was subjected to a *de facto* arrest, which required probable cause. *Reid*, 428 Md. at 305, 51 A.3d at 606. Based on the totality of the circumstances, the court concluded that, although law enforcement officers had articulable suspicion to believe that Reid was armed, the facts were insufficient to establish probable cause. *Id.* at 305-06, 51 A.3d at 607. According to the court, presence in a high crime area, unprovoked flight, and the possibility of being armed do not reach the probable cause standard. *Id.* at 307, 51 A.3d at 607 (citing *Bost v. State*, 406 Md. 341, 958 A.2d 356 (2008)).

Without sufficient probable cause, the court held that the public safety exception to *Miranda* did not apply to Reid's statements. *Reid*, 428 Md. at 309, 51 A.3d at 608. Although *Miranda* violations may be excused when police questioning is directed at eliminating a threat to public safety, it will not remove the taint of a previous Fourth Amendment violation. *Id.* at 308-09, 51 A.3d at 608. Additionally, the court was unwilling to engage in appellate fact-finding while the record below was devoid of any evidence showing what would have happened, had Reid's illegal arrest not occurred. *Id.* at 311-12, 51 A.3d at 610.

A strong dissent argued that the use of a taser in dart mode was reasonable, and therefore the *Terry* stop was proper. *Reid*, 428 Md. at 313, 51 A.3d at 611 (Harrell, J., dissenting). In determining whether a *de facto* arrest occurred, the dissent considered multiple factors to balance the intrusion on the Fourth Amendment against governmental interest, such as duration of the stop as well as the suspect's evasive actions. *Id.* at 314-15, 51 A.3d at 612 (Harrell, J., dissenting). Acknowledging the growth in police technology and the interest in protecting the safety of officers and civilians alike, the dissent asserted that the use of a taser in dart mode was reasonable and thus fell into the realm of a proper *Terry* stop. *Id.* at 330, 51 A.3d at 621 (Harrell, J., dissenting).

As a result of this decision, the court has stunted law enforcement's ability to utilize tasers in effectuating *Terry* stops. This places law enforcement officers in dangerous situations where they may be forced to engage physically with an armed individual. It further places other less-than lethal force modalities, such as non-dart tasers, in a legal gray area, leaving police departments to wonder if they are permitted to reap the benefits of new technology.