




2017

# Recent Development: Sellman v. State: Absent Additional Circumstances, Consent to a Vehicle Search in a High Crime Area Does Not Create Reasonable Suspicion to Justify a Terry Frisk of a Passenger Who Displays Nervous Behavior; Theft from a Vehicle Does Not Automatically Infer That an Individual is Armed

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## Recommended Citation

Simmons, Ashley N. (2017) "Recent Development: Sellman v. State: Absent Additional Circumstances, Consent to a Vehicle Search in a High Crime Area Does Not Create Reasonable Suspicion to Justify a Terry Frisk of a Passenger Who Displays Nervous Behavior; Theft from a Vehicle Does Not Automatically Infer That an Individual is Armed," *University of Baltimore Law Forum*: Vol. 47 : No. 2 , Article 12.

Available at: <http://scholarworks.law.ubalt.edu/lf/vol47/iss2/12>

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## RECENT DEVELOPMENT

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***SELLMAN V. STATE: ABSENT ADDITIONAL CIRCUMSTANCES, CONSENT TO A VEHICLE SEARCH IN A HIGH CRIME AREA DOES NOT CREATE REASONABLE SUSPICION TO JUSTIFY A TERRY FRISK OF A PASSENGER WHO DISPLAYS NERVOUS BEHAVIOR; THEFT FROM A VEHICLE DOES NOT AUTOMATICALLY INFER THAT AN INDIVIDUAL IS ARMED.***

**By: Ashley N. Simmons**

The Court of Appeals of Maryland held that, under the totality of the circumstances, a law enforcement officer did not have reasonable suspicion to conduct a *Terry* frisk of a passenger during a traffic stop. *Sellman v. State*, 449 Md. 526, 544, 144 A.3d 771, 782 (2016). The court ruled that a police department policy authorizing officers to conduct *Terry* frisks based on consent to search a vehicle violates the Fourth Amendment. *Id.* at 557, 144 A.3d at 790. The court further held that the crime of theft from vehicles does not imply the possession of a deadly weapon. *Id.* at 562, 144 A.3d at 793.

On November 12, 2013, at approximately 2 a.m., Corporal William Daughters (“Daughters”) and Officer Dan Kramer (“Kramer”) were on patrol at an apartment complex. The location was considered a high crime area due to prior thefts from vehicles, drug arrests, and illegal possession of handguns. Daughters observed an individual, later identified as Donzel Sellman (“Sellman”), emerge from a dark area of an apartment building where there was no entrance. Shortly after, Sellman got into the rear passenger seat of a vehicle with three other occupants. The officers conducted surveillance and eventually stopped the vehicle after noticing a broken taillight and tag light. Daughters later testified that he observed Sellman sitting rigidly and looking straight ahead to avoid eye contact. Daughters asked the driver if Sellman lived in the apartment complex, to which she replied in the affirmative. Sellman later gave a conflicting response, claiming that he did not.

Daughters issued a written warning to the driver and asked to search the vehicle, to which the driver consented. Daughters asked all of the occupants to identify themselves, and Sellman provided an alias. Daughters performed a warrant check on the alias and date of birth, for which there was no record. During this time, Daughters called for a third officer to see if any vehicles had been broken into at the apartment complex. Pursuant to the Anne Arundel County (“AACO”) Police Department’s policy allowing a limited frisk of occupants before a vehicle search, Daughters conducted a *Terry* frisk of Sellman in order to check for weapons. Sellman was arrested after Daughters discovered a handgun in his waistband.

Sellman filed a pre-trial motion to suppress the evidence seized from the *Terry* frisk, which the Circuit Court for Anne Arundel County denied. At

trial, Sellman pled not guilty subject to an agreed statement of facts to the charges of possession of cocaine with intent to distribute and possession of a firearm during a drug trafficking crime. Sellman was sentenced to ten years in prison, with the first five years served without the possibility of parole. Sellman appealed the constitutionality of the *Terry* frisk to the Court of Special Appeals of Maryland, which affirmed. In a split decision, the court held that theft from vehicles implies weapon use. One judge dissented, contending that the frisk was unconstitutional because officers as a matter of routine conduct suspicionless searches of passengers in vehicles, which does not meet the standard of reasonable suspicion.

The Court of Appeals of Maryland granted *certiorari*. Sellman, 449 Md. at 538, 133 A.3d at 778. The issues before the court were (1) whether Daughters had reasonable suspicion to believe Sellman was armed and dangerous based on Sellman's display of nervousness in an area with prior reports of theft from vehicles, and (2) whether a crime of theft from vehicles implies use of a deadly weapon. *Id.* The court reviewed the matters *de novo* based on the evidence presented at the suppression hearing. *Id.*

The court began its analysis by outlining the framework of a *Terry* frisk. Sellman, 449 Md. at 541-42, 133 A.3d at 780. Generally, a search and seizure violates the Fourth Amendment if it is not supported by probable cause. *Id.* However, under *Terry v. Ohio*, an officer may conduct a brief investigative stop of an individual if the officer has reasonable suspicion that criminal activity is afoot. *Id.* at 541, 133 A.3d at 780 (citing *Terry v. Ohio*, 392 U.S. 1, 17 (1968)). Furthermore, if the officer has reasonable suspicion that the individual is armed and dangerous, the officer may conduct a limited frisk of the individual to check for weapons. Sellman, 449 Md. at 541, 133 A.3d at 780 (citing *Terry*, 392 U.S. at 27). The court noted that not every *Terry* stop justifies a *Terry* frisk. Sellman, 449 Md. at 541, 133 A.3d at 780 (citing *Simpler v. State*, 318 Md. 311, 319, 568 A.2d 22, 25-26 (1990)).

Next, the court discussed the standard for reasonable suspicion. Sellman, 449 Md. at 542, 133 A.3d at 781. In order to establish reasonable suspicion, the officer must be able to identify specific and articulable facts that warrant a limited frisk for weapons when viewed objectively based on the totality of the circumstances. *Id.* at 542, 133 A.3d at 781 (citations omitted). Subjective beliefs and mere hunches are insufficient. Sellman, 449 Md. at 541, 133 A.3d at 780.

Subsequently, the court used a fact-specific analysis of the present case compared with previous case law to determine if Daughters had an objective reasonable suspicion to justify frisking Sellman. Sellman, 449 Md. at 544, 133 A.3d at 782 (citing *Terry*, 392 U.S. at 30). According to the court, Daughters failed to explain why, based on his training and experience, Sellman's conduct led him to believe that Sellman was involved in the previous vehicle break-ins and was therefore likely to be armed. *Id.* at 549, 133 A.3d at 785 (citing *Crosby v. State*, 408 Md. 490, 511-12, 970 A.2d 894, 906-07 (2009)). In addition, Daughters did not observe any threatening movements or gestures indicating Sellman was armed, or any instruments

indicating association with theft. *Sellman*, 449 Md. at 550, 133 A.3d at 786-87 (citing *Bailey v. State*, 412 Md. 349, 368, 987 A.2d 72, 83 (2010)). The court also noted that although Daughters called for back-up, the purpose was to check for evidence of a car theft, not to alleviate safety concerns of being outnumbered. *Sellman*, 449 Md. at 546, 133 A.4d at 784.

The court further held that *Sellman*'s nervousness, without more, was insufficient to establish reasonable suspicion of criminal activity. *Sellman*, 449 Md. at 554-55, 133 A.3d at 788 (citing *Ferris v. State*, 355 Md. 356, 387, 735 A.2d 491, 508 (1999)). Although seated rigidly in the vehicle, *Sellman* did not show exaggerated immobility or appear to be concealing anything in a piece of clothing large enough to hold a weapon. *Sellman*, 449 Md. at 556, 133 A.3d at 789 (distinguishing *Russell v. State*, 138 Md. App. 638, 653-54, 773 A.2d 564, 573 (2001)).

Next, the court discussed the lawfulness of the AACO police department's policy authorizing officers to frisk occupants of a vehicle prior to conducting a consent search. *Sellman*, 449 Md. at 557-59, 133 A.3d at 790-91. The court indicated that any search in the absence of reasonable suspicion is a violation of the Fourth Amendment. *Sellman*, 449 Md. at 557, 133 A.3d at 790. Holding otherwise would allow officers to conduct frisks after any lawful stops, which the court previously rejected. *Id.* (citing *Simpler*, 318 Md. at 321-22, 568 A.3d at 27). As a result, the court concluded that the police department policy was unlawful. *Sellman*, 449 Md. at 557, 133 A.3d at 790.

Finally, the court addressed whether theft from vehicles implies the possession of weapons, thereby providing reasonable suspicion that an individual is armed. *Sellman*, 449 Md. at 559-62, 133 A.3d at 791-93. The court concluded that absent other circumstances, theft from a vehicle does not automatically place an officer in a dangerous situation. *Id.* at 561, 133 A.3d at 792. Thus, the court declined to create a bright line rule that theft of property from a vehicle creates a presumption that the suspect is armed. *Id.* at 562, 133 A.3d at 793.

Judge Watts dissented from the majority's findings, arguing that the facts could establish a reasonable articulable suspicion by analyzing the totality of the circumstances differently. *Sellman*, 449 Md. at 568, 133 A.3d at 796. Judge Watts agreed that protecting citizens from unwarranted stop and frisks is critical, but contended that the factors led to a clear potential danger to the officers in the instant case. *Id.*

In *Sellman*, the Court of Appeals of Maryland held that Daughters did not have reasonable suspicion to conduct a *Terry* frisk of *Sellman*. The court also found that a policy allowing a search without reasonable suspicion is unconstitutional. This ruling demonstrates the high burden officers must overcome in order to show how the circumstances they observe prior to a *Terry* frisk were indicative of criminal activity and danger. This case illustrates the significance of officers and practitioners recognizing the fact-specific nature of the circumstances in justifying a limited *Terry* frisk.