The PoliceChief
The Professional Voice of Law Enforcement

Suspects Who Refuse to Identify Themselves

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A police officer does not need probable cause to stop a car or a pedestrian and investigate potential crime. According to the U.S. Supreme Court, a police officer may initiate a temporary stop, a level of intrusion short of an arrest, if the officer can articulate a reasonable suspicion that the suspect has committed a crime or is about to commit a crime.[1] This is commonly known as a *Terry* stop. Further, if the officer can articulate a reasonable basis for suspecting that the subject might be armed, he can pat down the outer clothing of the suspect in a limited search for weapons. This is commonly referred to as a *Terry* frisk.

The *Terry* rule has developed quite a bit since 1968, but some aspects remain murky. In particular, if the suspect refuses to give his name or any identifiers, may an officer arrest the suspect? According to the Supreme Court, the police may arrest for failure to identify if state law criminalizes such behavior.

Officers conducting a lawful *Terry* stop may take steps reasonably necessary to protect their personal safety, check for identification, and maintain the status quo.[2] Occasionally a suspect will refuse to identify himself. Pursuant to the Supreme Court's opinion in *Hiibel* v. *Sixth Judicial District Ct. of Nev.*, a state law requiring a subject to disclose his name during a *Terry* stop is consistent with the Fourth Amendment's ban on unreasonable search and seizure:

> *Obtaining a suspect's name in the course of a Terry stop serves important government interests. Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder. On the other hand, knowing identity may help clear a suspect and allow the police to concentrate their efforts elsewhere.*[3]

Such a statute does not implicate the subject's Fifth Amendment right to avoid self-incrimination, as simple disclosure of one's name presents no reasonable danger of incrimination. But the Court clearly limited the application of this new rule by also noting that an officer may not arrest a suspect for failing to identify himself if the identification request is not reasonably related to the circumstances justifying the stop. The question is, is the request for identity a commonsense inquiry or an effort to obtain an arrest for failure to identify after a *Terry* stop yielded insufficient evidence?

Furthermore, a state may not make it a crime to refuse to provide identification on demand in the absence of reasonable suspicion.[4] The Court has also held that a requirement that a detainee give "credible and reliable" identification information to the police upon request is too vague to be a criminal offense.[5]

In short, if the state has a law requiring suspects to identify themselves when asked to do so during a valid stop or detention, the U.S. Constitution will not bar arrest and prosecution for failure to do so. It is not clear what officers may do if their jurisdiction does not have a law against failing to identify oneself.

Failure to Identify and Traffic Stops

The U.S. Court of Appeals for the Tenth Circuit has held that, in the context of traffic stops based on reasonable suspicion alone, a "motorist may be detained for a short period while the officer runs a background check to see if there are any outstanding warrants or criminal history pertaining to the motorist even though the purpose of the stop had nothing to do with such prior criminal history."[6] Several other circuits have come to the same conclusion.[7]

The Tenth Circuit addressed the issue later in *United States* v. *Villagrana-Flores*: "We explained in Holt that 'the justification for detaining a motorist to obtain a criminal history check is, in part, officer safety' because 'by determining whether a detained motorist has a criminal record or outstanding warrants, an officer will be better apprized of whether the detained motorist might engage in violent activity during the stop.'" As long as the detention is for a short period, "the government's strong interest in officer safety outweighs the motorist's interests."[8]

Failure to Identify and Pedestrians

Officer safety is just as strongly implicated where the individual being detained for a short period of time is on foot rather than in an automobile. An officer detaining a pedestrian has an equally strong interest in knowing whether that individual has a violent past or is currently wanted on outstanding warrants. The citizen's interest, on the other hand, is no more robust merely because a short detention occurs while traversing on foot.

Moreover, permitting a warrants check during a *Terry* stop on the street also "promotes the strong government interest in solving crimes and bringing offenders to justice."[9] Indeed, an identity's utility in "inform[ing] an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder,"[10] would be nonexistent without the ability to use the identity to run a criminal background check.

What Does It Mean to Criminalize the Conduct?

It is up to each state or municipality to criminalize a suspect's failure to reveal his or her identity. Such laws may not make it a crime to fail to reveal one's name during a consensual encounter; to avoid violating the Fourth Amendment there must, at a minimum, be reasonable suspicion of crime afoot by the subject.[11]

Further, the stop-and-identify law must not be "vague," according to the Supreme Court. In *Kolender* it found a California statute unconstitutionally vague because it required the subject to produce "credible and reliable" identification that carried a "reasonable assurance" of reliability, and left it up to the officer to determine what "credible and reliable" and "reasonable assurance" are.[12] Acceptable statutes simply require disclosure and leave it to the subject to decide how to comply.[13]

If the name given by the subject turns out to be false, the subject has likely violated another law, giving the officer probable cause to arrest. The Nevada statute in question in the *Hiibel* opinion treats failure to disclose as a form of obstructing the discharge of an officer's official duties. It is quite likely that the charge of obstructing official duty would be untenable for failure to identify in a *Terry* stop without a law similar to Nevada's requiring a subject to identify themselves. In Texas a person is not guilty of failure to identify unless the person is already under arrest and refuses to give his name and other information. Further, an act criminally interfering with public duties may not consist of speech only. [14]

What If a State Does Not Criminalize Refusal to Identify?

An interesting question arises when state law does not make it a crime to refuse to identify oneself but does clearly allow the police to temporarily detain the suspect and determine his identity. The decision in *Hiibel* suggests that *Terry* allows officers to ask for identification as long as the request for identification is reasonably related in scope to the circumstances that justified the initial stop.[15] Also, *Terry* may permit an officer to establish or negate a suspect's connection to a crime by compelling the suspect to submit to fingerprinting.[16]

In *Hayes* the police were investigating a string of burglary-rapes and had recovered latent prints from one of the crime scenes and herringbone-patterned shoe prints.[17] Hayes was one of 40 suspects interviewed and came to be a principal suspect. Hayes refused to accompany police officers to the station for fingerprinting until threatened with arrest for refusing to comply. The police also seized from Hayes's house a pair of sneakers with a herringbone tread pattern. Hayes's prints matched the latent prints found at the scene.

The U.S. Supreme Court ruled that Hayes's fingerprints were illegally obtained and inadmissible. The Court endorsed the practice of fingerprinting a subject when there is reasonable suspicion that the prints will establish or negate the person's involvement in the crime being investigated. Further, the Court made it very clear that, under certain circumstances, the judiciary may authorize the seizure of a person on less than probable cause, and removal to the police station, for the purpose of fingerprinting. This is not to suggest that drivers, passengers, or pedestrians who refuse to identify themselves can be taken to the station for fingerprinting in all cases, only that it is possible in some cases.

Police Not Penalized for Stop Made Longer by Uncooperative Suspect

If an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop.[18] But when the delay in ending a *Terry* stop is attributable to the evasive actions of a suspect, the police do not exceed the permissible duration of an investigatory stop.[19]

There is some support for detaining a suspect during a *Terry* stop to determine his identity and conduct a warrants check, for which the suspects' identity is required.[20] The officer may detain the driver as long as reasonably necessary to conduct these activities and to issue a warning or citation. [21]

Court Allows Fingerprinting at Scene

The Supreme Court has specifically left open the option of detaining suspects, fingerprinting them at the scene, and attempting to identify them with their fingerprints or even getting a warrant on less than probable cause to take them to the police station and try to identify them.[22] Clearly, this option is burdensome for officers and intrusive for suspects.

Nevertheless, it might be justified when identification of a suspect is reasonably related to the scope of the stop. For instance, if the suspect is stopped because he somewhat matches the description of a wanted person, but not to the extent that he can be arrested for the crime, and the police have fingerprints of the wanted person, it might be both worthwhile and permissible to either get a court order authorizing seizure on less than probable cause and take the suspect to the station and fingerprint him or keep him at the scene, fingerprint him, and compare the prints. Any delay in ending the *Terry* stop would be attributable to the suspect's refusal to identify himself.

These options apply to a narrow set of facts, but there is support in the case law for dealing in this manner with suspects who refuse to identify themselves, who have not presented the officer with probable cause to arrest, and whose identity is reasonably related to the circumstances justifying the valid *Terry* stop.

Evidence Uncovered During a Stop

If during a *Terry* stop police discover that there exists a valid arrest warrant for the subject, the arrest would be unassailable. A person cannot claim that his person is the fruit of an illegal arrest and that he is therefore immune from prosecution.[23]

But evidence obtained during an illegal detention or frisk will be inadmissible.[24] For instance, a *Terry* frisk is a search for contraband. If an officer goes into a suspect's pocket and pulls out a wallet without probable cause to believe that there is contraband in the wallet or pocket, and contraband is found, the contraband is inadmissible.

If the officer uses the identification in the illegally obtained wallet to determine the subjects' identity for purposes of a warrant check, and it is determined that there is a valid warrant, the

arrest under warrant is good, but any evidence out of the wallet is inadmissible. The courts have not clarified the ramifications of an illegal search that results in the discovery of a warrant that leads to a valid arrest.

Verbal Identification or Requirement of Documentation?

In *Hiibel* the Court notes that the Nevada statute "apparently does not require him to produce a driver's license or any other document." In *Kolender* we learn that a law requiring "documentary identification" may be unconstitutionally vague. One imagines, though, that a statute that specifies what documents are satisfactory would survive a vagueness challenge.

Still, the Supreme Court has never dealt squarely with the constitutionality of a state statute that requires production of documentary identification in an investigative detention or the legality of an arrest of a pedestrian for refusal to produce documentary identification. Obviously, if someone is operating a motor vehicle in a public area they can be required to produce the associated privilege license, which of course has the effect of identifying that person.

But what of suspects who are stopped but are not operating vehicles? Current law generally does not require that ordinary pedestrians even carry documentary identification and it remains to be seen what courts will do with the issues surrounding a requirement of documentary identification. Naturally, if someone is arrested, any documentary identification on that person can be located in the search incident to arrest. ■

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[1] *Terry* v. *Ohio*, 392 U.S. 1, 16-17 (1968).

[2] *United States* v. *Hensley*, 469 U.S. 221, 229, 235 (1985).

[3] *Hiibel* v. *Sixth Judicial Dist. Ct. of Nev.*, 542 U.S. 177, 186 (2004).

[4] *Brown* v. *Texas*, 443 U.S. 47 (1979).

[5] *Kolender* v. *Lawson*, 461 U.S. 352, 362 (1983).

[6] *United States* v. *Holt*, 264 F.3d 1215, 1221 (10th Cir. 2001) (en banc).

[7] See *United States* v. *Brigham*, 382 F.3d 500, 507-08, 507-08 n.5 (5th Cir. 2004).

[8] *United States* v. *Villagrana-Flores*, 467 F.3d 1269 (10th Cir. November 7, 2006).

[9] See *United States* v. *Hensley*, 469 U.S. 221, 229, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985).

[10] *Hiibel*, 542 U.S. 186.

[11] *Brown*, 443 U.S. 52 (1979).

[12] *Kolender*, 461 U.S. 360.

[13] See *Hiibel*, 542 U.S. 187.

[14] Texas Penal Code 38.02 and 38.15 (West 2006).

[15] Citing *Terry*, 392 U.S. 16.

[16] Citing *Hayes* v. *Florida*, 470 U.S. 811 (1985).

[17] *Hayes*, 470 U.S. 812.

[18] *United States* v. *Sharpe*, 470 U.S. 675, 685 (1985).

[19] *United States* v. *Sharpe*, 470 U.S. 687-88.

[20] See *United States* v. *Thompson*, 282 F.3d 673, 678 (9th Cir. 2002); *United States* v. *Beck*, 140 F.3d 1129, 1134 (8th Cir. 1998); *United States* v. *White*, 81 F.3d 775, 778 (8th Cir.1996), cert. denied, 519 U.S. 1011 (1996).

[21] See *United States* v. *Wood*, 106 F.3d 942, 945 (10th Cir. 1997); *United States* v. *Trimble*, 986 F.2d 394, 397-98 (10th Cir. 1993) cert. denied, 508 U.S. 965 (1993).

[22] See, for instance, *Kaupp* v. *Texas*, 538 U.S. 626, 630 n.2 (2003), and *Hayes* v. *Florida*, 470 U.S. 811, 817 (1985).

[23] *New York* v. *Harris*, 495 U.S. 14, 21; *United States* v. *Crews*, 445 U.S. 463, 474 (1980).

[24] See *United States* v. *Hudson*, 405 F3d 425, 439 (6th Cir. 2005), citing *United States* v. *Green*, 111 F.3d 515 (7th Cir.) cert. denied, 522 U.S. 973 (1997).

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