

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JERRY RAY CORLISS, Plaintiff	:	Civil Action No.:	5:08-cv-5624
	:		
	:		
vs.	:	JURY TRIAL DEMANDED	
	:		
DALE STOKES AND THE CITY OF ALLENTOWN,	:	Honorable Thomas M. Golden	

**PLAINTIFF’S BRIEF IN SUPPORT OF HIS MOTION FOR  
PARTIAL SUMMARY JUDGMENT UNDER F.R.C.P 56(a)**

**I. FACTS**

The facts upon which the Plaintiff is relying are set forth in the contemporaneously filed Statement of Uncontested Facts, and will not be here repeated, except as necessary to make a point.

**II. QUESTIONS PRESENTED**

**A. WHEN A FULLY UNIFORMED LAW ENFORCEMENT OFFICER, ACTING UNDER COLOR OF STATE LAW, DETAINS A CITIZEN, DEMANDS THE PRODUCTION OF IDENTIFICATION AND SEIZES THE CITIZEN’S PROPERTY, WITHOUT HAVING ANY REASONABLE SUSPICION THAT CRIMINAL ACTIVITY IS AFOOT, HAS THAT LAW ENFORCEMENT OFFICER VIOLATED THE CONSTITUTIONAL RIGHTS OF THE CITIZEN?**

**Suggested Answer: Yes**

**B. WHEN A FULLY UNIFORMED LAW ENFORCEMENT OFFICER, ACTING UNDER COLOR OF STATE LAW, VIOLATES THE FOURTH AMENDMENT RIGHTS OF A CITIZEN BY DETAINING THE CITIZEN, DEMANDING IDENTIFICATION, DEMANDING THE PRODUCTION OF IDENTIFICATION AND SEIZING THE**

**CITIZEN'S PROPERTY, WITHOUT HAVING ANY REASONABLE SUSPICION THAT CRIMINAL ACTIVITY IS AFOOT, IS THAT LEO ENTITLED TO QUALIFIED IMMUNITY?**

**Suggested Answer: No**

**III. ARGUMENT**

**The Standard.**

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In conducting this analysis, the court must view all reasonable inferences drawn from the facts in the light most favorable to the non-moving party. **Integrated Service Solutions, Inc.,v. Dennis M. Rodman, Defendant/Third Party Plaintiff v. Joseph Uricchio, Third Party Defendant**, 2009 U.S. Dist. LEXIS 36182 (E.D., Pa, 2009). An issue is "genuine" under Rule 56(c) if the evidence is such that a reasonable jury could return a verdict for the non-moving party. **Anderson v. Liberty Lobby, Inc.**,477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. The existence of some factual dispute between the parties does not preclude summary judgment, unless there is a genuine issue of material fact. Id.at 248. (emphasis added).

The party bearing the ultimate burden of proof on the claim at trial has a more stringent burden of production when it seeks summary judgment. Its motion must establish the absence of a genuine factual issue. **National State Bank v. Federal Reserve Bank of N.Y.**, 979 F.2d 1579, 1582 (3d Cir. 1991). Once a moving party has satisfied its burden of production, the burden shifts to the non-movant to show, by setting forth specific facts, that there is a genuine issue for trial. **Anderson**, 477 U.S. at 250.

#### **A.1 The illegality of the detention.**

It cannot be denied that the interaction between Stokes and the Plaintiff at the Home Depot on October 6, 2008 was an encounter that is governed by the Fourth Amendment to the United States Constitution. I cannot put it any plainer, any simpler or any clearer than Chief Justice Warren writing for the Court in **Terry v. Ohio**, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed. 2d 889 (1968), when he said:

“It is quite plain that the Fourth Amendment governs ‘seizures’ of the person which do not eventuate in a trip to the station house and prosecution for crime – ‘arrests’ in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person...It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.” **Terry**, at 16-17, 88 S.Ct. at 1877, 20 L.Ed. 2d at 903.

The Defendants do not seem to be arguing that this encounter was not a seizure, but rather seem to be arguing that such seizure was justified so that

Stokes could identify the Plaintiff. See Statement of Facts, ¶13. That very same argument, that a Law Enforcement Officer (LEO) has the right to stop a citizen and demand identification when there is no reasonable suspicion that criminal activity is afoot, was made to and rejected by the United States Supreme Court thirty years ago in **Brown v. Texas**, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357, 1979 U.S. LEXIS 136 (1979).

In that case, two El Paso police officers were on patrol around noon time in an area that had a lot of drug incidents. Although they acknowledged that they did not suspect the defendant of any specific misconduct or suspect that he was armed, the police officers nonetheless demanded that Brown identify himself, which he refused to do. After continuing to refuse to identify himself, he was arrested for violation of a Texas Statute which provided that:

“(a) A person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information” Texas Penal Code, Title 8, §38.02(a).

The Defendant was subsequently convicted of the offense and fined \$45.00 plus court costs. On appeal to the United States Supreme Court, this decision was reversed, and in so reversing the Court made several pronouncements which are of significance to the matter now under scrutiny, as follows:

(a) When the officers detained the Defendant for purposes of requiring him to identify himself, they performed a seizure of his person subject to the requirements of the Fourth Amendment. **443 U.S. at 50, 61 L.Ed, 2d at 361.**

(b) In convicting the defendant, the County Court necessarily found as a matter of fact that the officer “lawfully stopped” the Defendant, as required by that section of the Texas Penal Code. **Id.**

(c)The Fourth Amendment applies to all seizures of a person, including seizures that involve only a brief detention short of traditional arrest. **Id.** (*internal quotes and citations omitted*).

(d). “the flaw in the State’s case is that none of the circumstances preceding the officer’s detention of [the defendant] justified a reasonable suspicion that he was involved in criminal conduct” **Id.**, at 52-53, 61 L.Ed 2d at 362.

Compare that situation to one where the Law Enforcement Officer makes a legitimate stop under **Terry** because she has a reasonable suspicion that criminal activity is afoot. In that case, requiring the citizen to produce identification under those circumstances is not a violation of the Fourth Amendment. **Hiibel v. Sixth Judicial District Court of Nevada**, 542 U.S. 177, 124 S.Ct. 2451, 159 L.Ed 292 (2004).

Despite these long standing and clearly established principles of law, and despite the fact that the Defendant, Stokes, and the Chief of Police of the City acknowledged that an LEO needs to meet the “reasonable suspicion” standard of **Terry** before an investigative detention can be made, Stokes just plowed ahead in conscious disregard

of the Constitution and trampled all over the Fourth Amendment rights of the Plaintiff. Indeed, the undisputed facts in this case are even more compelling than the facts in **Brown, supra**, for at least in that case the encounter took place in a drug infested neighborhood, whereas the incident now before the Court took place in the middle of a retail establishment that was open for business.

### **A.2 The illegality of the confiscation of the firearm**

The seizure of the firearm suffers from the same constitutional infirmity as does the detention, and that is the absence of any reasonable suspicion that criminal activity was afoot, as required by **Terry, supra**. The Defendant attempts to justify this seizure on the basis of his own safety. See, Statement of Facts, ¶¶ 15-16. However, this is not a recognized exception to the requirements of the Fourth Amendment under **Terry** and its progeny.

The Defendants may attempt to argue that there should be a loosening of the standards governing their ability to detain a citizen and confiscate his property, because, after all, a “gun” was involved. However, the United States Supreme Court was faced with this very question of whether the involvement of a gun puts a chink in the armor of the Fourth Amendment, and very clearly indicated that it does not.

In **Florida v. J. L.**, 529 U.S. 266; 120 S. Ct. 1375; 146 L. Ed. 2d 254 (2000), the police received an anonymous tip that a young black male wearing a plaid shirt at a particular location was carrying a gun. The police responded, saw a young black male wearing a plaid shirt at the location and, although they did not see a gun or have any

other reason to suspect that the plaid shirt was engaging in any illegal conduct, they nonetheless detained the individual. The gun was found and he was charged with various violations of federal law relating to the carrying of a concealed weapon. The trial court suppressed the evidence and, when the case arrived in the United States Supreme Court, that suppression was affirmed. The holding of the case was that an anonymous tip that a person carrying a gun is not, without more, sufficient to justify a stop and frisk of that person and that decision was predicated on the lack of any indicia of reliability about the informant. **Id., at 275, 146 L.Ed 2d 265.**

In an effort to save the case, both the State of Florida and the United States, as *amicus*, argued that the standard **Terry** analysis should be modified to permit a “firearm exception” such that a tip that would fail standard pre-search **Terry** criteria would nonetheless justify a stop and frisk because of the inherent dangers of firearms. The Supreme Court’s immediate response was “we decline to adopt this position... an automatic firearm exception to our established reliability analysis would rove too far.” **Id., at 261, 146 L.Ed 2d 272.**

While that case involved the reliability of an informant and how that intertwines with the principals of **Terry v. Ohio**, and this case involves the authority of the police when encountering a citizen who is doing nothing more than shopping at a retail establishment while legally and visibly displaying a firearm, the principle is the same – **Terry** requires some reasonable suspicion of criminal activity before a detention will be constitutional, and since an LEO cannot seize the firearm without necessarily detaining

the citizen, both are illegal, improper and unconstitutional. As stated by the Supreme Court in Florida v. J.L., allowing this intrusion and this confiscation in the absence of reasonable suspicion would “rove to far” from the long standing principles announced in Terry, and followed ever since. Thus, any argument by the Defendants that, because a firearm was involved, the Fourth Amendment requirement should be loosened to allow the police to detain an individual carrying a firearm and demand a license and/or identification must meet the same fate as the government’s argument in Florida v. J.L., supra. That fate, of course, is a clear and unequivocal rejection of any loosened standard because a gun is involved, whether it is being applied to the sufficiency and reliability of a tip, or to the circumstances now before this Court.

The situation now before this Court has to be distinguished from the situation where there is a lawful stop/detention for reasons which meet the Terry standards. This situation was most recently addressed by our Supreme Court in Arizona v. Johnson, 129 S. Ct. 781; 172 L. Ed. 2d 694; 2009 U.S. LEXIS 868 (2009). In that case, the Supreme Court concluded that, once a legitimate traffic stop was made, the police can, without violating the Fourth Amendment, perform a patdown of the driver and the passengers, *but only if there is a reasonable suspicion that the person may be armed and dangerous.* Id., at 787, 172 L.Ed. at 703. (emphasis added). While it is clear that the Plaintiff in this case was armed, there is not one shred of evidence that the Plaintiff was considered dangerous, the second element of the

requirement. Indeed, as pointed out in the Statement of Facts, at no time throughout this entire encounter did Stokes feel threatened. See, Statement of facts, ¶ 12.

### **A.3. The encounter was not de minimus.**

It is anticipated that the Defendants may attempt to argue that this encounter, if it was a violation of the Plaintiff's rights at all, was so *de minimus* so as to not require protection from this Court. The response to that was articulated over forty years ago, by Chief Justice Warren in the course of deciding **Terry v. Ohio, supra**, as follows:

“Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a ‘petty indignity.’ It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly. “ **Terry**, at 16-17, 88 S.Ct. at 1877, 20 L.Ed. 2d at 903.

Facing a wall with his hands raised is exactly what the Plaintiff was required to do. See, Statement of Facts, ¶14. The thing that makes this all the worse is that Stokes knew it was illegal and a violation of the Constitutional Rights of the Plaintiff. He knew he needed reasonable suspicion to detain the Plaintiff, Statement of Facts ¶3, he knew he did not have that, Statement of Facts ¶ 11, and he knew or should have known that officer safety only becomes a justification for confiscating the firearm, if he had a reasonable suspicion, which he did not.

**B. The Individual defendant is not entitled to qualified immunity, since the Constitutional right was so clearly established**

I am going to go out on a limb here and assume that the Defendants will argue that qualified immunity protects the individual Defendant in this case from all liability for any violation of the Plaintiff's Constitutional Rights. The present formulation of the concept of qualified immunity in this context had its genesis in

**Harlow v. Fitzgerald**, 457 U.S. 800; 102 S. Ct. 2727; 73 L. Ed. 2d 396; 1982 U.S.

LEXIS 139 (1982). In that case, the Supreme Court articulated the concept as follows;

“We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. See **Procunier v. Navarette**, 434 U.S. 555, 565 (1978); **Wood v. Strickland**, 420 U.S., at 322”. **Harlow**, *Id.*, at 818, 102 S. Ct. at 2738, 73 L.Ed. 2d at 410.

To that simple and unadorned pronouncement, the Courts, over the years, have added a lot of refinements and clarifications. A police officer is entitled to qualified immunity if he reasonably, but mistakenly, concludes that probable cause is present.

**Hunter vs. Bryant**, 502 U.S. 224, 112 S.Ct. 534, 116 L.Ed. 2d., 589 (1991). To overcome a qualified immunity defense, Plaintiff must show that it is obvious that no reasonably competent police officer would have concluded that he or she had no right to take the action which was taken. **Carson vs. Lewis**, 35 F.Supp. 2d. 250

(E.D.N.Y.,1999). In making this decision, the Court must look at the reasonableness of the alleged conduct in light of the facts that were available to the police at the time. **Lampkin vs. City of Nacogdoches**, 7 F.3d. 430 (5<sup>th</sup> Cir., 1993). Even if it is later determined that probable cause did not exist, police officers are entitled to qualified immunity, as long as reasonably competent police officers could disagree on whether or not probable cause did exist. The qualified immunity defense gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law. **Hunter vs. Bryant**, **supra** (citations omitted, internal quotations omitted). The Court's function is not to determine if the officers could have done a better job of investigating. The Court need only decide if the conclusions reached by them, in light of the information available to them was reasonable, although mistaken. **Simley vs. Ferndale**, 181 F.3rd 103 (6<sup>th</sup> Cir., 1999). In reviewing claims of qualified immunity, the Court must be sensitive to the broad range of professional judgment accorded to law enforcement

“...the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, see **Mitchell, supra**, at 535, n. 12; but it is to say that in the light of pre-existing law the unlawfulness must be apparent. See, e. g., **Malley, supra**, at 344-345; **Mitchell, supra**, at 528; **Davis, supra**, at 191, 195.” **Anderson v. Creighton**, 483 U.S. 635.at 640, 107 S.Ct. 3034 at 3039, 97 L.Ed. 2d 523 at 531.

Fortunately, in this particular case, the Court will not have to spend a great deal of time analyzing or agonizing over whether the right here is "clearly established", for the right to be free from unreasonable searches and seizures has been so established ever since the Bill of Rights was enacted, and the specifics of the right to be free from unwarranted detention during the course of an encounter with a law enforcement officer has been clearly established ever since **Terry v. Ohio**, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed. 2d 889 (1968). Indeed, this right is so clearly established that the individual Defendant, Dale Stokes, acknowledged his understanding of that right, when he testified, under oath in his deposition that before he could detain a citizen he needed a reasonable suspicion that criminal activity was afoot. See, Statement of Undisputed Facts, #3..

Furthermore, in the absence of any reasonable suspicion that criminal activity is afoot, it has been clearly and unequivocally unconstitutional to detain a citizen and demand identification for the past thirty years, ever since **Brown v. Texas**, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357, 1979 U.S. LEXIS 136 (1979).

The Defendant will no doubt attempt to argue that the presence of a firearm in this encounter changes all the rules since the ability and the right of a law enforcement officer to stop, detain and demand identification from someone carrying a firearm has never specifically been ruled unconstitutional, and therefore, the illegality of the detention, given the firearm, has not been clearly established. Of course, stopping,

detaining and demanding identification from someone committing the social *faux pas* of wearing white pants after Labor Day has never been specifically ruled unconstitutional either. That doesn't mean that either one of the above detentions is not a violation of a clearly established right.

To be established clearly, there is no need that 'the very actions in question [have] previously been held unlawful'." **Safford Unified School District #1 v. April Redding**, 129 S. Ct. 2633 at 2643; 174 L. Ed. 2d 354 at 366; 2009 U.S. LEXIS 4735 (2009); *quoting* **Wilson v. Layne**, 526 U.S. 603, 615, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999); **See also, Anderson v. Creighton, supra** ("...in the light of pre-existing law the unlawfulness must be apparent"). In this case, the preexisting law was so apparent that Stokes himself acknowledged that a detention required "reasonable suspicion" and further acknowledges that he did not have it. Statement of Undisputed facts, ¶3,11.

The Supreme Court's most recent foray into the qualified immunity area was on June 25, 2009, when the Court handed down the decision in **Safford Unified School District #1 v. April Redding**, 129 S. Ct. 2633; 174 L. Ed. 2d 354; 2009 U.S. LEXIS 4735 (2009). That case involved the strip searching of a 13-year-old middle school student for prescription strength pain relievers. Ultimately, the strip search, on the facts presented to the Court, was found to be unconstitutional. However, the Court also found that the individual defendants were nonetheless entitled to qualified immunity. In reaching that decision, the Court reviewed various divergent opinions from the lower courts, which, to use a nonlegal expression, were all over the board in defining and

describing the parameters of the rights of school officials to conduct strip searches and the rights of the students to be free from such intrusions. The Court was careful to point out that entitlement to qualified immunity is not a guaranteed product of these “disuniform views” of the law. However,

“... the cases viewing the school strip searches differently from the way we see them are numerous enough, with well reasoned majority and dissenting opinions, to counsel doubts that we were sufficiently clear in the prior statement of law” Id., at 2644, 174 L.Ed 2d 366.

There is absolutely nothing in the pre-existing law to even hint at a firearm exception to the traditional police encounter rules enunciated in Terry v. Ohio, supra. Indeed, as pointed out above, efforts to persuade the Supreme Court to loosen the Terry standard when there is a firearm involved met with a summary rejection, as setting a standard that would “rove to far” from the well established principles of the Fourth Amendment. Florida v. J. L., 529 U.S. 266; 120 S. Ct. 1375; 146 L. Ed. 2d 254 (2000).

Some people are going to be offended if they encounter an individual wearing white pants after Labor Day; some people are going to be offended if they encounter a same sex couple holding hands in a restaurant and some people are going to be offended by observing an individual openly carrying a firearm in a public retail establishment. There is no qualitative difference between these three scenarios, and none of them provide a law enforcement officer with the authority or the right to detain the offending party, demand identification and

seize the offending party's property. The right of all citizens to be free from this type of intrusion when there is no suspicion, reasonable or otherwise, that criminal activity is afoot is so clearly established that no reasonably competent, reasonably well trained police officer could be unaware of it, and, in this particular case, Defendant Stokes was aware of it, but chose to proceed contrary to all of this, for a reason that has never been sanctioned or recognized by any Court. The qualified immunity defense must fail.

#### **IV. CONCLUSION.**

Because Officer Stokes did not have any reasonable suspicion that the Plaintiff was engaged in any criminal activity or that criminal activity was otherwise afoot, his detention of the Plaintiff was a violation of the Plaintiff's fourth amendment right to be free from unreasonable searches and seizures. Furthermore, the confiscation of the Plaintiff's firearm was likewise a violation of the Plaintiff's fourth amendment rights.

Because Chief Justice Warren has already determined that the illegal detention of the Plaintiff was "...a serious intrusion upon the sanctity of the person, which may inflict great indignity...", the Plaintiff is entitled to some amount of compensatory damages.

Finally, because the right of the Plaintiff, in these circumstances, to be free from the detention and the confiscation of this property, was so clearly established, and because the individual defendant Stokes acknowledged the

parameters of this right but chose to proceed contrary to it, Stokes is not entitled to qualified immunity.

For all these reasons, the Plaintiff is entitled to the grant of partial summary judgment and the scheduling of a trial for a determination of damages only.

Respectfully submitted:

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