



**LGIT'S ROLL CALL REPORTER
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QUESTION: Does non-specific “caution data” concerning a suspect’s criminal record, standing alone, establish reasonable articulable suspicion to conduct a protective *Terry* frisk for weapons?

ANSWER: The answer is “no” if the caution data does not include details as to the nature of the prior offense(s), the date(s) the crimes were committed, and the outcome of the charge(s) (e.g., conviction or acquittal). Non-specific caution data, even related to a crime of violence, standing alone will not be sufficient to justify a *Terry* frisk for weapons.

CASE: *United States v. Obie Lee Powell*, U.S. Court of Appeals (4th Cir.)
Decided November 14, 2011

In this case, the U.S. Court of Appeals for the Fourth Circuit considered the issue of whether an officer had reasonable articulable suspicion (RAS) to conduct a *Terry* “frisk” of an occupant of a vehicle during a routine traffic stop. The facts established that on the night of November 21, 2006, Officer Catrina Davis of the Seat Pleasant Police Department observed a 1997 Buick occupied by three individuals pull out from a parking lot. Obie Lee Powell was the passenger in the backseat of the Buick. The Buick had a burned-out headlight, so Officer Davis stopped it. Officer Davis got out of her car and approached the driver. She obtained the driver’s license and the vehicle’s registration card and returned to her patrol car. Corporal Leroy Patterson, who was working patrol with Officer Davis, had approached the passenger side of the Buick and engaged Powell in a friendly, casual conversation. While this was going on, a third officer, Officer Christopher Shelby, arrived on the scene and joined Corporal Patterson on the passenger side of the car.

At some point, Powell asked how long the traffic stop would take because he needed to pick up a child. Corporal Patterson responded that he wasn’t sure how long the stop would take but that Powell was free to leave at any time. Powell remained in the back seat. Eventually, communications advised Officer Davis, who was still in her patrol car, that the driver’s license was suspended. Officer Shelby, who was still standing on the Buick’s passenger side, heard the communication on his personal radio. In response, he asked Powell and the other passenger, a female, if either of them had a valid driver’s license. He did this to determine if either passenger could drive the vehicle after the traffic stop was completed. The officer, however, did not tell the passengers why he had asked the question. Powell gave his license to Officer Shelby who checked its status via radio. Communications advised Officer Shelby that Powell’s license was suspended and that he had “priors” for armed robbery. The information concerning “priors”, known as “caution data”, comes from a computer database and is communicated to police in Seat Pleasant anytime a person has

ever been charged with a crime, no matter when the charge was made or its disposition. So, concerning Powell's "priors", Officer Shelby did not know whether they were "yesterday's news or 15 years ago news," and did not know if Powell had actually been convicted of anything.

During the traffic stop, neither Powell nor any other occupant of the Buick had appeared suspicious or presented any threat or problem to the officers. However, based solely on the caution data, Officer Shelby ordered Powell from the Buick and began to perform a *Terry* frisk (patdown) for weapons. During the patdown, Powell became nervous and twice dropped to one knee. Powell then tried to run but the officers prevented him from doing so. Once Powell was fully controlled, he was handcuffed to allow the patdown to be completed. Corporal Patterson removed Powell's backpack from the Buick's backseat and searched it. Inside of it he found a handgun. Powell was then placed under arrest. During a search incident to arrest, the officers found crack cocaine on Powell's person. At the conclusion of the traffic stop, the driver was cited for the traffic violation and he and the other passenger were allowed to leave. The Buick remained parked on the street.

A federal grand jury indicted Powell for possession with intent to distribute crack cocaine, possession of a firearm by a convicted felon, and possession of a firearm in furtherance of a drug trafficking crime. Before trial, Powell moved to suppress the evidence. The federal trial court denied his motion on grounds that the officers had RAS to believe that Powell was armed and dangerous at the time of the patdown. Powell was convicted of only the lesser drug charge and sentenced to a 63-month term of imprisonment. Powell appealed.

The appeals court reversed the trial court's ruling on the motion to suppress and vacated Powell's conviction. In doing so, the court expressed its concern that in a growing number of cases officers were found to have conducted *Terry* frisks for weapons with literally no RAS to believe the suspect was presently armed and dangerous. In other words, the court was concerned that "officer safety" was quickly becoming nothing more than a catchphrase to justify patdowns for weapons when, in fact, there were no objective criteria that officers could point to in order to legally justify the frisk.

In this case, the Government argued that the "caution data" relating to Powell and Powell's supposed misrepresentation concerning the status of his driver's license were sufficient to establish the RAS needed to justify the patdown. The appellate court disagreed on grounds that the RAS standard is an objective one, and simply labeling a behavior as "suspicious" doesn't make it so. What is needed is clear articulation of why a particular behavior is suspicious or for the officer to logically demonstrate, given the surrounding circumstances, that the behavior is likely to be indicative of some more sinister activity than may appear at first glance.

Here, there was no evidence that the traffic stop occurred in high-crime area or at a similarly unsafe location. Also, there was no suspicious, threatening, or evasive conduct by any of the occupants and the officers outnumbered the occupants. Further, the court said that, in most instances, a prior criminal record is not, standing alone, sufficient to create reasonable articulable suspicion. If the law were otherwise, any person with any sort of criminal record-or even a person with arrests but no convictions-could be subjected to an investigative stop or a protective frisk for weapons without any other justification. Officer

Shelby had only the “caution data” to justify the patdown. That limited information, without more, was simply not enough in the courts’ eyes to justify the intrusion.

NOTE: If the “caution data” had provided details as to when the prior armed robbery or robberies had occurred or if the criminal charges had resulted in conviction(s), the result might have been different. The court said that “[t]he striking lack of specificity of the information . . . draws no distinction between, for example, a recent armed robbery conviction and a decades-old wrongful armed robbery charge, and in the officers’ view, such a distinction is irrelevant.” So, if you are going to rely on caution data alone to justify a *Terry* frisk for weapons, make sure you have the specifics to do so. If you are going to rely on caution data combined with the suspect’s behavior, then be sure to articulate why the behavior was obviously suspicious or, in the case of more discreet conduct that can be associated with gang affiliation, drug-dealing, or possession of concealed weapons, explain the logical connection between the conduct and your conclusion that the suspect could be armed and dangerous. Finally, false statements can be considered in establishing RAS but, again, standing alone, they will be insufficient to establish RAS.

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