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A police officer who reasonably suspects that a person possesses a weapon must conduct an actual *Terry* frisk; the officer cannot order the suspect to remove or lift an article of clothing in order to reveal the presence or absence of a weapon

QUESTION: **In conducting a *Terry* frisk, can an officer order a suspect to lift his shirt?**

ANSWER: **No. An unorthodox police procedure, even if not particularly intrusive, is not an acceptable functional equivalent of a true frisk (or pat-down) for weapons.**

CASE: ***Terry Keith Epps v. State***
Court of Special Appeals, Decided May 28, 2010

In this case, the Court of Special Appeals again considered the scope of a *Terry* "frisk" for weapons. The facts in the case established that on May 3, 2006, Terry Keith Epps was a front seat passenger in a car subjected to a traffic stop. The vehicle was stopped for speeding by Harford County Deputy Sheriff Jeffrey Gerres. Deputy Sheriff Javier Moro quickly arrived on the scene as back-up. The stopped car was driven by Epps' brother, Stephon David Epps. A check revealed that Stephon Epps was driving on an expired license. He also failed to produce a registration card for the vehicle. During the stop, Deputy Moro asked Terry Epps, who was still seated in the passenger seat, to lift his shirt. As he did so, Deputy Moro observed a small, clear plastic baggie protruding to the top of Epps' pants. The deputies recovered the baggie and it, in turn, was found to contain both a small bag of marijuana and 13 small bags of cocaine.

Epps was charged with possession of cocaine with the intent to distribute and with the possession of marijuana. Epps moved to suppress the evidence. At the suppression hearing, both Deputy Geres and Deputy Moro described Epps' movements as they approached the car and made contact with the occupants. Deputy Geres articulated on the stand that he thought Epps might have a weapon that he was concealing in his groin area. Instead of relying on *Terry*, however, the State argued *only* that Epps' lifting of his shirt was a voluntary, consensual act made during a "mere accosting." As a result, the State urged, and the trial court agreed, that Epps lifting his shirt was consensual and did not violate the Fourth Amendment. Epps was subsequently convicted by a Harford County jury. Epps appealed.

While Epps' appeal was pending, the United States Supreme Court decided *Brendlin v. California*, holding that when police make a traffic stop, a passenger in the stopped vehicle is "seized" under the Fourth Amendment just as surely as the driver. As a result, Epps' case was sent back to the trial court so that it could reconsider its ruling on the voluntariness of Epps' consent. After a second suppression hearing during which only legal points pertaining to the issue of consent were argued, the trial court again denied Epps' motion. This time, however, it did so on grounds that a valid "frisk" for weapons under *Terry v. Ohio* had taken place. The court reviewed the testimony concerning the deputies' observations and concluded that "either officer had the right to order Epps out of the car and pat him down for a weapon." The trial court also pointed out that the lifting of the shirt was less intrusive than a pat-down and that, because of this fact, the demands of *Terry* were satisfied. Epps appealed again, this time contending that the trial court had failed to limit its analysis solely to the issue of consent.

The Court of Special Appeals agreed that the trial court had exceeded its authority when it considered grounds other than consent. The court, however, also considered the merits of the *Terry* frisk. Based upon the facts, the appellate court concluded that directing Epps to lift his shirt exceeded the scope of the tightly limited intrusion permitted by *Terry v. Ohio.* The court assumed without deciding that there was an articulable suspicion for a frisk, though it charcterized the issue as a "close call." The issue the court chose to focus on, however, was the scope of the frisk. In this regard, the court concluded that only the knowledge possessed by Deputy Moro, the deputy who asked Epps to lift his shirt, would have any bearing on the justification for the frisk. Any information possessed by Deputy Gerres *that was not communicated to Deputy Moro* could not be considered as justification for the frisk. So, in effect, only those facts known to the "frisking" officer can be included in determining whether or not reasonable articulable suspicion exists. In other words, what an officer does not know cannot be the basis for any suspicion on his part. The court then concluded that the scope of the frisk, *i.e.,* directing Epps to lift his shirt, was beyond what *Terry* allowed. The scope of a *Terry* frisk is to discover the presence of suspected offensive weapons---the purpose is not to discover contraband or other evidence. A frisk generally is limited to a patting down of the exterior of the clothing surface. Here, directing Epps to lift his shirt went beyond the limited scope of a *Terry* frisk. The direction to lift the shirt revealed a small baggie that would not have been revealed during a standard frisk. The fact that lifting the shirt was "less invasive" than a pat-down was not a valid consideration under the constitution. For example, what if Epps had been a female? Since the frisk exceeded the limits imposed by *Terry*, the court ruled that Epps' motion to suppress should have been granted. As a result, Epps' convictions were overturned.

> **NOTE**: It should be noted that an officer who conducts a frisk may not lift the suspect's shirt to verify the presence or absence of a weapon. Also, the practice of "requesting" a frisk ("Can I pat you down for weapons?") is problematic. The court observed that "it is hard to accept that even a request for frisk, let alone a frisk itself, would not constitute such a 'show of authority' by a uniformed officer as to push any submission to it into the category of a Fourth Amendment seizure

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of the person." Keep in mind that there is no Maryland case in which consent to a request to be frisked has been deemed to be voluntary.

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