LGIT'S *ROLL CALL REPORTER*
SEPTEMBER 2011

The particularized reasonable suspicion needed to frisk a suspect for weapons cannot be established by the suspect's refusal to give consent.

QUESTION: **Is the particularized and reasonable suspicion needed to frisk a suspect for weapons established by the suspect's refusal to give consent?**

ANSWER: **No. A refusal to cooperate with a police officer's request to search or frisk, without more, does not establish reasonable articulable suspicion to conduct a frisk.**

CASE: ***United States v. Tyerail D. Massenburg***
United States Court of Appeals for the Fourth Circuit
Decided August 15, 2011

On March 28, 2009, at 10:33 p.m., Richmond City Police received an anonymous tip that shots had just been fired. The caller reported eight shots fired "possibly" two blocks south of 14th and Hull Streets, a high-crime area in which drug activity as well as random gunfire were common occurrences. The caller said nothing more, giving no description of a suspect. Officers Stephen Gaines and Eric Fries responded to the call and arrived at the intersection of 14th and Hull at 10:48 p.m. They split up and patrolled the area in their marked police cars. Officer Fries soon saw four young black men, including Tyerail Massenburg, walking north at the corner of East 17th Street and Stockton Street, four blocks from the alleged origin of the shots. The young men were walking in the direction of Officer Fries' marked car and did not stop or change course when they saw it. They were the only persons Officers Fries observed in the area.

Officer Fries approached in his vehicle and asked, "hey guys, can you stop a second?" The men stopped and the officer asked if they had heard gunfire. One of the men said that he had heard shots fired from a vehicle on Maury Street, two blocks away from where they were. Officer Gaines arrived and the officers exited their cars. They began taking the indivdiuals' names. Officer Fries then asked if they had weapons on them and if they would consent to a pat-down. By now, the four men were basically lined up in a row on the sidewalk, with the man who said that he had heard gunfire on the left end of the line. Massenburg was on the right end. Massenburg stood a foot or two from the man next to him while the others stood shoulder to shoulder. The man on the left consented to Officer Fries' request for a pat-down, as did the man next to him. Officer Gaines started at the other end and asked Massenburg for consent to a frisk. Massenburg appeared "stand-offish," not really nervous although he didn't make eye contact. He did, however, refuse consent, saying that he didn't have anything and that he didn't need to be checked for weapons. As

he did so, he made movements as if he were patting himself down. Officer Gaines insisted and patted Massenburg down without his consent. During the frisk, Officer Gaines felt the handle of a firearm on Massenburg's waist, but Massenburg fled before he could grab it. Officer Gaines pursued and ordered Massenburg to drop the weapon. Massenburg complied by dropping the gun on the grass but he kept running. Officer Gaines caught him and arrested him. A small amount of marijuana was recovered after a search of Massenburg's person.

Massenburg was charged with possession of a firearm by a drug user and possession of marijuana. He moved to suppress the evidence prior to trial arguing that the officer had no reasonable articulable suspicion (RAS) to believe that he was armed and dangerous or otherwise engaged in criminal activity. His motion was denied and he was convicted and sentenced to eighteen months in prison. Massenburg appealed.

On appeal, the Court of Appeals for the Fourth Circuit reversed, finding that, indeed, the officer did not have RAS to conduct a Terry frisk of Massenburg for weapons. In fact, the court said that there was "precious little" to support the contention that Officer Gaines had any particularized RAS as to Massenburg. As to the initial vague anonymous tip of shots possibly being fired, the court concluded that it provided no "predictive" information and therefore left the police without means to test the informant's knowledge or credibility. The tipster had disclosed her basis of knowledge-she supposedly had heard the shots-but little else. Further, the tip contained no physical description of suspects or any other outward identifying features-how many there were, where they were heading, etc. In short, when a tip lacks sufficient indicia of reliability, mere presence in the area identified by the tip does not generate RAS. And, the suspects here were four blocks away from the location where the tipster reportedly had heard the shots. Also, the fact that the events occurred in a high-drug, high-crime area added little to the tip, and nothing in the way of a particularized suspicion of Massenburg. Like any other anonymous tip, a tip concerning firearms must present a certain indicia of reliability before it can provide a basis for particularized RAS.

As to Massenburg's behavior, the court again warned that officers cannot proffer whatever facts are present, no matter how innocent, as indicia of suspicious activity. In other words, just because an officer labels a behavior as suspicious does not make it so. **Importantly, the court rejected the suggestion that Massenburg's refusal to consent to be frisked was "suspicious." This is because a refusal to cooperate with a police request, without more, does not establish RAS**. Massenburg did not engage in evasive behavior or appear to be agitated. Merely avoiding eye contact by looking down, the court said, is hardly "suspicious." There were no shaking hands, heavy breathing, or providing inconsistent answers. Finally, Massenburg's "self-pat-down" was deemed to have provided little basis, if any, to believe that RAS existed. Since RAS for the pat-down did not exist, the court reversed the trial court, and Massenburg's convictions were vacated.

NOTE: In this case, Officer Fries, who did not frisk Massenburg, had seen a small bulge in Massenburg's left jacket pocket prior to Officer Gaines's frisk. Officer Fries, however, did not alert Officer Gaines prior to the frisk. Even so, the government urged that the "collective-knowledge doctrine" (also called the "fellow officer" rule) should be applied, thereby imputing Officer Fries' observation to Officer Gaines. The court rejected this argument, stating that any such application of the doctrine would stretch it well beyond its

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purpose. The doctrine justifies the acts of an officer who acts on the instructions of another officer if the instructing officer has sufficient information to justify taking such action himself. The doctrine is usually applied in the context of executing search and/or arrest warrants, where the officer who executes the warrant is justified in relying on the probable cause established by the officer who obtained the warrant. Here, because Officer Gaines did not frisk Massenburg based on the observations made by Officer Fries, observations that were not actually communicated to Officer Gaines, the collective-doctrine did not apply. One final issue was not addressed by the court: does an officer even have the right to ask someone to "consent" to be frisked? Certainly, officers can ask for consent to search-but a pat-down or frisk for weapons is not a search. It is an investigatory tool designed for officer safety that is far less invasive than a search. In this regard, Maryland's appellate courts have recognized that asking for consent to frisk is appropriate. However, as with all consent issues, the burden is on the prosecution to prove that the defendant freely and voluntarily consented to the frisk of his person.

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