RECENT DEVELOPMENT

CRIMINAL PROCEDURE—SEARCH AND SEIZURE—Investigative stop of automobile held constitutional regardless of quantum of supporting facts necessary to constitute "reasonable" grounds for stop.—*Williams v. State,* 307 N.E.2d 457 (Ind. 1974).

A recent Indiana Supreme Court decision, *Williams v. State,*[1] raises the question what, if any, restraints the fourth amendment places on the power of police to make investigative stops of automobiles when a crime has been committed and the detaining officers position themselves along a potential escape route. At 10:02 p.m. on the date in question, two Indiana State Police officers received information that a motel had been robbed in West Lafayette and that the two Negro suspects, one armed with a sawed-off shotgun, were believed headed northwest. The officers proceeded to an intersection known to be a major link up with Interstate 65, which is the most direct route north to Chicago, and proceeded to observe the traffic. One of the officers believed the driver, and only apparent occupant, of a passing car was a Negro, and therefore this car was followed. In order to obtain a better view, the officers first passed the suspect vehicle and later parked in a service station lot where, under the improved lighting conditions, one of the officers became certain that the driver was a Negro. The suspect vehicle was then pulled over and upon approaching the car, the officers sighted a second man hiding in the back seat. When this second man exited the car, a shotgun was seen on the floor of the car.

The trial court denied the defendants' motions to suppress and ruled that the stop was reasonable and thus any evidence seized from the car was properly admissible at trial. The defendants, who were subsequently adjudged guilty of robbery, petitioned for post conviction relief on the ground of error in the trial court's determination of reasonableness. The Indiana Court of Appeals reversed the trial court.[2] The Indiana Supreme Court granted transfer and in a three-to-two decision reversed the court of

---

[1]307 N.E.2d 457 (Ind. 1974).

[2]Williams v. State, 299 N.E.2d 882 (Ind. Ct. App. 1973).

appeals and affirmed the judgment of the trial court. While the court tacitly recognized the proposition that the fourth amendment circumscribes the lawfulness of investigatory stops, its decision raises the question whether such restraints are merely illusory.

In determining that the stop in question was lawful, both the plurality opinion of Chief Justice Arterburn and the concurrence of Justice Hunter[3] concluded that the stop was reasonable within the parameters established for investigative stops in *Terry v. Ohio*.[4] Neither opinion, however, adequately dealt with the thres-

---

[3]In concurring, Justice Hunter adopted the dissent of Judge Buchanan of the Court of Appeals. Williams v. State, 299 N.E.2d 882, 888 (Ind. Ct. App. 1973). Judge Buchanan had argued that the stop was reasonable. Judge Sullivan had argued for reversal on the theory that in Indiana a car could not be stopped for less than probable cause to arrest. *Id.* at 886. Judge White concurred in the result reached by Judge Sullivan and reasoned that the stop was not reasonable. *Id.* at 888.

[4]392 U.S. 1 (1968). While *Terry* marked the Supreme Court's first sojourn into the area of temporary investigative detentions, the journey was undertaken pursuant to a dirth of commentary which in light of the Court's embracement of the exclusionary rule emphasized the need to square such procedures with the fourth amendment. *See, e.g.*, Abrams, *Constitutional Limitations on Detention for Investigation*, 52 IOWA L. REV. 1093 (1967); Bator & Vorenberg, *Arrest, Detention and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62 (1966); Kuh, *In Field Interrogation: Stop, Question, Detention and Frisk*, 3 CRIM. L. BULL. 597 (1967); LaFave, *Detention for Investigation by the Police: An Analysis of Current Practices*, 1962 WASH. U.L.Q. 331; Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L.C. & P.S. 393, 406-16 (1963). Given the protean nature of street encounters, it is understandable, or at least not surprising, that the Court did not use *Terry* as a vehicle to map out precise routes which police must follow in forcing street encounters. *See* LaFave, *"Street Encounter" and the Constitution:* Terry, Sibron, Peters, *and Beyond*, 67 MICH. L. REV. 40, 46 (1968). What is surprising is the Court's subsequent reluctance to face the issues inherent in such stops and to elucidate a more precise set of standards or guidelines by which such myriad encounters can be scrutinized. That is, in retrospect and because of the already well-established practice of forcing *Terry*-type encounters, the legitimizing of such practice was quite foreseeable. *Id.* at 42. Equally understandable is the Court's reluctance to grapple with the matrix of issues which inure in stops of law-abiding citizens when there is no reason to believe that any crime is afoot. *See* Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161 (1966). However, the Court's pronouncement that investigative seizures invite substantial interferences with liberty and personal security certainly demonstrated the Court's appreciation of the need for standards by which stops falling within the parameters of *Terry* cases and mere arbitrary stops of law abiding citizens could be judicially evaluated. 392 U.S. at 12. The Court's failure to foray into this interstitial area is not only curious but, more importantly, fraught with a capacity for erosion of fourth amendment values when it is realized that "reasonableness" as a

hold question, implicit in *Terry*,[5] of what facts justified the officers in stopping the suspect vehicle. Thus, the decision leaves unanswered the fundamental issue of how the reasonableness standard of *Terry* is to be applied so as to give meaning to the fourth amendment proscription against arbitrary invasions of privacy.[6]

In *Terry*, the Court explicitly stated that investigative searches were circumscribed by the fourth amendment.[7] Mindful of society's interests in effective and expeditious law enforcement and the limited intrusion occasioned by investigative stops, the Court also ruled that such stops could be legitimately effected on less than probable cause to arrest.[8] Nonetheless, the Court carefully pointed out that fourth amendment values in an investigative setting could only be adequately served by requiring officers to justify their actions by the reproduction of facts which would justify a reasonable man in concluding that the action taken was appropriate.[9] This standard, albeit a watered down progency of

---

guiding standard is susceptible of applications which transgress the sacrosanct notion that objectivity is the principle by which all fourth amendment seizures are to be judged. *See* Abrams, *supra*, at 1117. This capacity was noted by Justice Douglas when dissenting in *Terry*:

> There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today.

392 U.S. at 39.

[5]392 U.S. at 33-34 (Harlan, J., concurring).

[6]For the proposition that the fourth amendment protects unreasonable invasions of privacy, see Katz v. United States, 389 U.S. 347 (1967).

[7]392 U.S. at 889. *Terry* of course did not deal with the legality of the stop, but focused on the frisk. In Adams v. Williams, 407 U.S. 143 (1972), the Court applied Terry's reasonableness standard to stops and thus for analytical purposes, it is of no real concern that *Terry* in its inception was viewed as possibly limited to frisks when the suspect was believed armed and dangerous. *See The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 176 (1972).

[8]392 U.S. at 905. In subjecting fourth amendment rights to invasions on less than probable cause to arrest, the Court was not writing on an entirely clean slate. The groundwork for its proposition that not all searches and seizures must be tested by probable cause was laid in Camara v. Municipal Court, 387 U.S. 523 (1967), and See v. City of Seattle, 387 U.S. 541 (1967). In those cases, the Court held that warrants for safety inspections could be obtained for less than the probable cause traditionally required to search. *See* LaFave, *Administrative Searches and the Fourth Amendment: The* Camara *and* See *Cases*, 1967 SUP. CT. REV. 1, 13-17.

[9]392 U.S. at 21.

probable cause to arrest or search, was felt by the court capable of affording protection against entrenchment of constitutionally protected rights by officials acting on nothing more than inarticulate hunches.[10] Thus, while the *Terry* Court refused to rule that all seizures were governed by the warrant clause,[11] it also stated that the lesser standard of reasonableness did not afford a basis for rejecting the traditional fourth amendment requirement that intrusions be predicated on specific and articulable facts.[12]

Realizing that an investigative stop must be supported by a factual basis, the question arises as to what type or quantum of facts must exist before a stop becomes reasonable. The decisions in *Terry* and *Adams v. Williams*[13] shed considerable light on the issue. In *Terry,* the officer personally observed the conduct justifying the intrusion. Similarly, in *Adams,* the investigating officer had information that an identified person was committing a

---

[10]*Id.* at 22.

[11]While the Court placed emphasis on the reasonableness clause as the constitutional standard for testing investigative procedures it could have reached the same result by simply following its reasoning in *Camara* and *See, viz,* that the societal interests to be served in balance with the intrusion occasioned by a stop justified a lowering of the probable cause necessary to justify such intrusions. This arguably would have been more consistent with the Court's traditional approach to fourth amendment questions, *i.e.,* testing of warrantless seizures and searches by the warrant clause so as to ensure that policemen could not act without a warrant under circumstances in which a warrant could not have been obtained from a judicial officer. *See,* Lafave, *Street Encounters and the Constitution:* Terry, Sibron, Peters *and Beyond,* 67 MICH. L. REV. 40, 53-56 (1968). The approach taken in *Terry* is defensible when it is realized that reasonableness erects an overall limit on searches and seizures of which probable cause is but one evidentiary standard by which such conduct is tested. *See* Ker v. California, 374 U.S. 23 (1963). *See also The Supreme Court, 1967 Term,* 82 HARV. L. REV. 1, 181 (1968).

[12]392 U.S. at 22. By bringing investigative stops within the circumspection of the fourth amendment the *Terry* Court not only recognized a valuable police tool but also signaled a potential end to attempts to place such practices outside the purview of courts wielding the awesome power of the exclusionary rule by a process of euphemistic labeling. LaFave, *supra* note 11, at 52. Nevertheless, this safeguard becomes meaningful only if courts resist the pressures to use "reasonableness" as a predicate to ignore the more substantive standards which have been formulated in order to reflect the values encompassed by the metaphoric wording of the proscription against "unreasonable" seizures. For a catalogue of cases in which courts have succombed to just such pressures, see Cook, *The Art of Frisking,* 40 FORDHAM L. REV. 789 (1972). Cook characterizes such decisions as "incredible." *Id.* at 798.

[13]407 U.S. 143 (1972).

crime.[14] In both cases, then, the factual complexes provided a basis for justifiable beliefs that criminal activity was afoot and that the stopped suspect was likely to be the perpetrator. There was, in short, a demonstrable nexus between the criminal conduct and the person stopped. Sensitivity to the factual complexes in *Terry* and *Adams* therefore supports the proposition that a stop is justified when the officer has reason to believe that a crime has been committed or is about to be committed and that the suspect is the perpetrator of the offense.[15] This proposition also finds support in that it serves to further the goal of subjecting stops to something more than a vague and subjective standard. This concern that fourth amendment rights not be relegated to subjective standards is at the forefront of fourth amendment jurisprudence, and thus cases should be read so as to further the goal of objectivity.[16] By requiring the articulation of facts connecting the detainee with conduct under investigation, the fear that a person can be seized arbitrarily, in the sense that subjectivity is the yardstick by which stops are constitutionally measured, is considerably assuaged.

In light of the above, the critical question presented by the facts in *Williams* was what facts known to the officers at the time

---

[14]In *Adams*, the detaining officer received information that an individual seated in a nearby Oldsmobile had narcotics in his car and was carrying a gun somewhere on his waist. Based on these facts, the Court held it was reasonable to approach the individual and to reach for the gun when the suspect rolled down his window instead of opening the door as had been requested.

Adams arguably extended *Terry* beyond its author's intended scope in two ways. First, it extended the right to stop to conventional possessory crimes and thus compelled a rejection of the theory that *Terry* was limited to cases in which violent crime was in the offing. Adams v. Williams, 407 U.S. 143, 152 (1972) (Brennan, J. dissenting). Secondly, *Adams* lessened the standards by which the credibility of an informant and the reliability of his tip are to be tested. 407 U.S. at 157. For a discussion of these arguments, see *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 171 (1971). *See also* Cook, *The Art of Frisking*, 40 FORDHAM L. REV. 789 (1972); Comment, *Stop and Frisk*, 63 NW. L. REV. 837 (1969); Note, *The Limits of Stop and Frisk—Questions Unanswered by* Terry, 10 ARIZ. L. REV. 419 (1968).

Granting that *Adams* abandoned some of the previously perceived limits on the right to stop and frisk, the Court in finding the conduct reasonable stressed the officer's knowledge that a crime was likely to be taking place and that a particular defendant was committing the crime. 407 U.S. at 144-45.

[15]LaFave, *supra* note 11, at 75.

[16]*Id.* at 73. That *Terry* was not intended to lessen the requirement of testing police conduct by objective standards is made quite clear by Chief

of the stop justified their conclusion that the stopped defendant was likely to have committed the robbery. It was precisely this question with which neither of the majority authors dealt when they simply labeled the stop reasonable. Rather than face this issue, the majority supported its reasonableness finding by presenting a series of arguments which in essence justified the stop on the basis of society's interest in detecting crime. As such, the opinions virtually ignore the individual's right to be free of even a limited intrusion such as a stop absent a factual justification and effectively insulate police conduct from fourth amendment scrutiny.

Chief Justice Arterburn, joined by Justice Givan, first cited Justice Jackson's dissent in *Brinegar v. United States*[17] for the proposition that the officers could have erected a roadblock in order to apprehend the fleeing suspects. Apparently, his theory was that since a roadblock would have been constitutionally reasonable, an individual stop is equally reasonable. This argument is objectionable for two reasons. It fails primarily because the Chief Justice was unable to direct us to any cases save automobile inspection stops which support his proposition that roadblocks are constitutionally permissible. On this point, Justice DeBruler in dissent was more forthright when he concluded that such indiscriminate dragnet procedures as those proposed by the Chief Justice were condemned, not supported, by precedent.[18] Secondly, the Chief Justice failed to deal with the fact that Jackson in *Brinegar* was not arguing in favor of vehicle stops on suspicion, but rather was condemning such police behavior. His roadblock example is cited as a situation in which he might strive to justify seizures on suspicion.[19]

The Chief Justice next offered the opinion that it may be constitutionally valid to detain an identifiable group when one of the group must have committed the crime. This theory can be squared with *Terry* in that when there is a definable group, there is a substantial likelihood of the stopped person's being the per-

---

Justice Warren's opinion in *Terry* in which he cited precedent to the effect that the Court had consistently refused to sanction intrusions on constitutionally protected rights when the policemen acted on inarticulable hunches or in mere good faith. This same concern, he stated, mandated the application of an objective standard in *Terry*-type cases. 392 U.S. at 21-22.

[17]338 U.S. 160, 183 (1948).

[18]Williams v. State, 307 N.E.2d 457, 464 (Ind. 1974) (DeBruler, J., dissenting). *Cf.* Davis v. Mississippi, 394 U.S. 721 (1969).

[19]338 U.S. at 183 (Jackson, J. dissenting).

petrator of the offense.[20] The problem of applying this theory to the facts of *Williams* is readily apparent, *viz,* how did the officers know that the suspects would pass them? If there were only one road north this knowledge could be inferred, and coupled with the fact of the suspects' color, there might be a factual basis supportive of the stop in question. However, as the dissent pointed out there was more than one route north and, in fact, the defendants were stopped on a road other than the one the officers had determined to be the most likely escape route.[21] Thus, while having some merit, the Chief Justice failed to demonstrate how this theory applied to the instant case. Also, he did not attempt to define the limits of this theory so as to prevent its becoming a vehicle for totally indiscriminate detentions.[22]

Finally, the Chief Justice left us with language to the effect that in contemporary society the need for expedient law enforcement justifies a lenient interpretation of reasonableness.[23] This argument missed the point that in *Terry* and *Adams* the United States Supreme Court had already striven to accommodate this societal concern and in so doing made it incumbent on officers to act on more than mere hunches in forcing encounters.[24]

---

[20]*Cf.* Gaskins v. United States, 260 A.2d 810 (D.C. Ct. App. 1970).

[21]Williams v. State, 307 N.E.2d 457, 462 (Ind. 1974) (DeBruler, J., dissenting).

[22]Justice DeBruler's dissent pointed out the potential for such abuses unless a group is readily definable and somehow limited in size when he posited the hypothetical of all persons in a department store being subjected to a search for recently stolen jewelry. *Id.* at 464.

[23]*Id.* at 461. Underlying the majority opinions seems to be the premise that because automobiles offer means for rapid escapes a strained application of the "reasonableness" standard is justified. *Id.* at 461, 468. While it is true that the United States Supreme Court has allowed warrantless searches of automobiles on an exigent circumstance theory, these cases do not support the majority's sub silentio rationale. Cars are afforded sui generis status for the purpose of validating searches effected after a valid arrest. This situation is markedly different from the position apparently taken by the majority in *Williams. See* Chambers v. Maroney, 399 U.S. 42 (1970); Carrol v. United States, 267 U.S. 132 (1925). For a concise discussion of the law pertaining to warrantless vehicle searches, see 23 VAND. L. REV. 1370 (1970).

[24]For a recent Indiana case giving proper credence to this mandate against seizures based on mere hunches, see Elliott v. State, 309 N.E.2d 454 (Ind. Ct. App. 1974). The court, in applying the "indicia of reliability" test established in Adams v. Williams, 407 U.S. 143 (1972), reversed the trial court's determination that a pat-down revealing a gun was reasonable. In reversing, Judge White, writing for the majority, reasoned that the initial stop was effected upon unreliable information and the subsequent search was constitutionally suspect. 309 N.E.2d at 458.

Though the concurring opinion of Justice Hunter attempted to justify the stop on less novel grounds than those of the Chief Justice, it also failed to broach the question of what facts supported the conclusion that the stopped car contained the suspects. Instead, Justice Hunter first pointed out that the automobile affords an attractive method of escape and listed several factors which must be considered in determining reasonableness.[25] He then concluded that the stop was reasonable because the car was in the range of possible flight and the suspects were known to be black.[26]

Justice Hunter cited several cases which he stated to be factually and theoretically supportive of the court's finding of reasonableness. An examination of these cases indicates otherwise. They basically fall into three groups: stops when the officers had specific identifying criteria,[27] classic *Adams*- and *Terry*-type stops,[28] and automobile stops for license checks.[29] Common to all these cases, except perhaps *United States v. Jackson*,[30] is that the officers either personally observed the conduct giving rise to the stop or had information tending to connect the suspect with the crime in question. Thus, unless Justice Hunter was

---

[25]307 N.E.2d at 467-68.

[26]*Id.* at 468.

[27]United States v. Edwards, 469 F.2d 1362 (5th Cir. 1972) (stop of a car containing two Negroes, one wearing a bush hat, after officer personally observed the car speeding from a military post where two robberies had just occurred and one of the robbers had been described as wearing a bush hat); United States v. Miller, 452 F.2d 731 (10th Cir. 1971) (officers stopped a black car with a white door and no hood); United States v. Jackson, 448 F.2d 963 (9th Cir. 1971) (a stop four days earlier created cause to believe that same men had possibly just committed a bank robbery); United States v. Gazaway, 297 F. Supp. 67 (N.D. Ga. 1969) (officer stopped a newly painted blue, heavily laden 1961 Oldsmobile containing the defendant who was known to the officers as suspected of trafficking in illegal liquor by using a white 1961 Oldsmobile).

[28]United States v. Catlano, 450 F.2d 985 (7th Cir. 1971) (officers observed suspicious conduct of known burglar); Carpenter v. Sigler, 419 F.2d 169 (8th Cir. 1969) (personal observation of suspicious conduct by driver of out-of-county car in a business district at night); Ballou v. Massachusetts, 403 F.2d 982 (1st Cir. 1968) (informant gave information that suspect was at a particular place and armed); Bramlette v. Superior Court, 273 Cal. App. 2d 799, 78 Cal. Rptr. 532 (1950) (observation of panel truck not known to the stopping officer after he had observed the vehicle over an extended period of time).

[29]Palmore v. United States, 290 A.2d 573 (D.C. Ct. App. 1972) (stop of a rented Virginia licensed vehicle to see if it was properly leased.)

[30]448 F.2d 963 (9th Cir. 1971).

saying that skin color plus northerly flight is an adequate substitute for the more detailed identifying criteria common to these cases, it is difficult to fashion a rationale short of subterfuge for his citing these cases. If he was adopting the proffered rationale, then he was merely embracing the Chief Justice's theory than an identificable group can be subjected to seizure for purposes of investigating crime. However, as pointed out above, this theory requires some method of limiting the group to a manageable size in order to prevent the procedure from approaching dragnet dimensions.

Admittedly, the *Jackson* case is more difficult to distinguish from the instant case. There, the officers stopped and questioned three black men proceeding east from a point where a liquor store robbery had taken place. This stop produced nothing. However, four days later a bank robbery occurred and the description of the perpetrators and their car met the description of the previously stopped car. The three men questioned earlier were the bank robbers. While ruling that the original stop was reasonable, the *Jackson* court alternatively held that even if unreasonable, the lapse of time and the innocuousness of the information obtained thereby did not warrant a finding that the subsequent seizures were tainted.[31] Thus, by virtue of this alternative holding, it cannot be said that *Jackson* squarely supports stops when black persons are observed heading toward a black section of town. Yet, even assuming it does, the problem of distinguishing this situation from an arbitrary dragnet is still left unanswered by the *Jackson* court and by Justice Hunter's opinion.

In *Terry*, the Supreme Court recognized the need to accommodate the societal interests of crime prevention and detection with the individual's right to be free of arbitrary invasions of privacy. In striking this compromise, the Court gave great weight to the need for swift affirmative police action when faced with criminal conduct. Nevertheless, the Court explicitly rejected the argument that fourth amendment standards were not applicable to such intrusions. Rather, the Court inveighed against the type of wholesale emasculation of constitutionally protected rights which would attend such a holding.[32] By failing to place upon police the fundamental requirement of reproducing facts showing a substantial possibility that Williams was connected with the criminal conduct under investigation, the Indiana Supreme Court has given its imprimatur to just this type of pernicous emasculation.

---

[31] *Id.* at 970.

[32] 392 U.S. at 21.