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State v. Hairston2019-Ohio-1622

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I. INTRODUCTION

State of Ohio v. Hairston is an unfortunate departure by the Ohio Supreme Court from the protections that the U.S. Constitution provides to its citizens.[1] The Fourth Amendment states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[2] In *Hairston*, this note argues that the dissenting Justices are correct in pointing out that Hairston's constitutional rights were violated when officers searched his person and found an illegally concealed firearm.[3] The majority here adopts a standard for reasonable suspicion that has been explicitly rejected by the Supreme Court of the United States.[4] The majority lowers the burden for an officer to find reasonable suspicion before conducting a search and in doing so, infringes on the rights that have long been held as essential to that of a free people.[5]

II. STATEMENT OF FACTS

Columbus Police Officers Moore and Kaufman were responding to a domestic dispute on a late March evening in 2015.[6] While responding to the radio call, the officers heard the sound of four or five gunshots.[7] The officers reported that the sound of the shots was not faint and appeared to come from a location close to their current position.[8] Testimony from Officer Moore indicated that they believed the shots occurred west of their position, in an area near a local elementary school.[9]

The officers drove toward the location they believed the shots to have come from.[10] They drove a distance of approximately four-tenths of a mile when they encountered an individual who was walking away from the

1. U.S. Const. amend. IV.
2. *Id.*
3. State v. Hairston, 156 Ohio St.3d 363, 377. (Ohio, 2019).
4. *Id.* at 386-87.
5. *Id.* at 376-77.
6. *Id.* at 364.
7. *Id.*
8. *Hairston*, 156 Ohio St.3d at 365.
9. *Id.* at 364.
10. *Id.*

elementary school while talking on a cellphone.[11] The individual was later identified as Jaonte Hairston.[12] When the officers arrived at Hairston's location, they exited their vehicle, weapons drawn, and they ordered Hairston to stop and show them his hands.[13] According to the arrest form, Officer Kaufman kept his gun drawn on Hairston while Officer Moore patted down Hairston for weapons.[14] The officers asked Hairston if he was carrying weapons, to which Hairston nodded toward his jacket pocket.[15] The officers found a concealed weapon on Hairston and charged him with violating R.C. 2923.12(A).[16]

At trial, Hairston claimed the officers lacked a reasonable suspicion to detain him and filed a motion to suppress any evidence obtained during the stop.[17] The trial court denied Hairston's motion and the judge, while stating that Hairston's case was "a close call," found that the facts testified to by the Officer Moore supported a denial of the motion to suppress.[18] The Tenth District Court of Appeals reversed the decision of the trial court and found that police lacked a reasonable suspicion to detain Hairston under the standard set forth in *Terry v. U.S.*.[19] The Supreme Court of Ohio then accepted the state's discretionary appeal and reversed the decision of the Tenth District Court of Appeals.[20]

III. COURT'S DECISION AND RATIONALE

A. Majority Opinion by Justice DeWine

The majority opinion found that the trial court correctly denied defendant's motion to suppress and reversed the holding of the appellate court.[21] The majority reviewed the facts of the case and determined that the officers had reasonable suspicion to detain Hairston.[22] The Court started by explaining that two separate standards exists for police searches.[23] The first, a traditional arrest, requires that the officers had probable cause to arrest the

11. *Id.*
12. *Id.*
13. *Hairston*, 156 Ohio St.3d at 372.
14. *Id.*
15. *Id.* at 364.
16. *Id.* at 365.
17. *Id.*
18. *Hairston*, 156 Ohio St.3d at 379.
19. *Id.* at 365.
20. *Id.* at 365-66.
21. *Id.* at 369.
22. *Id.*
23. *Hairston*, 156 Ohio St.3d at 365-66.

suspect.[24] The second type of stop is an investigative stop.[25] The Court stated "an officer may perform sch a stop when the officer has a reasonable suspicion based on specific and articulable facts that criminal behavior has occurred or is imminent."[26] This is the standard set forth in *Terry v. Ohio* and has been coined with the term *Terry* stops.[27] Reasonable suspicion is a lower standard than the probable cause standard.[28] Whether an officer had reasonable suspicion to stop a suspect depends upon the totality of the circumstances viewed through the eyes of a reasonable and prudent police officer.[29] The Majority also focused on the fact that the analysis must be based on the cumulative facts, not viewed in isolation of each other.[30]

The Majority emphasized a few facts which supported their determination that Officer Moore had reasonable suspicion to stop Hairston.[31] First, Officer Moore personally heard the sound of the gunshots.[32] The court found it significant that the officers were not responding to a radio dispatch when reacting to the gunshots, but rather, had personally heard the sound of gunfire.[33] Second, Officer Moore new that specific part of town through personal history of his work with the police department.[34] Officer Moore worked that same area of town for six years and was familiar with the various criminal activities and patterns that occurred in that neighborhood.[35] The Court stated that "an officer's experience with criminal activity in an area and an area's reputation for criminal activity are factors we have found relevant to the reasonable-suspicion analysis."[36] Third, the fact that the stop occurred after dark was significant to the Court.[37] Finally, the Court found that the most important fact in this case was that the stop occurred in very closely in time to when the officers heard the gunshots and Hairston was the only person in the area where the sound of the gunshots originated.[38]

The Majority's primary contention with the analysis of the court of appeals was their evaluation of the facts.[39] The Majority stated that the court of appeals viewed all of the relevant facts in isolation of each other, and that

24. *Id.* at 366.
25. *Id.* at 365.
26. *Id.* at 365-66 (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)).
27. *Id.* at 366.
28. *Hairston*, 156 Ohio St.3d at 366.
29. *Id.*
30. *Id.* at 367.
31. *Id.* at 366.
32. *Id.*
33. *Hairston*, 156 Ohio St.3d at 366.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Hairston*, 156 Ohio St.3d at 366.
39. *Id.* at 367.

none of the facts individually supported a finding of reasonable-suspicion.[40] However, the Court emphasized that reasonable suspicion must be "based on the collection of facts, not on the individual factors themselves."[41] The Majority also stated that the court of appeals improperly relied on the fact that Hairston did not flee when the officers arrived on the scene to support its conclusion that the officers lacked reasonable suspicion to stop Hairston.[42] The Supreme Court of Ohio concluded that all the facts, when viewed together, supported a finding that the officers had reasonable suspicion to stop Hairston.[43]

Finally, the Majority also addressed Hairston's assignment of error that the stop was converted into an arrest when the officers approached him with their guns drawn.[44] The majority quickly dispensed with this argument by pointing out that offers may take steps that are reasonably necessary to protect themselves.[45] According to the Court, the fact that the officers had just heard gunshots a short distance from their current location justified them approaching Hairston with their weapons drawn, as he was the only person in the area from which the sound of gunshots originated.[46]

B. Concurring Opinion by Justice Donnelly

Justice Donnelly wrote a separate opinion concurring in the judgment only.[47] The concurring opinion framed the primary issue in the case quite differently.[48] Rather than conducting an independent inquiry in whether the officers had reasonable suspicion to stop Hairston, Justice Donnelly viewed the analysis of the trial court judge who had considered all of the same facts as the Tenth District.[49] He framed the issue as one of judicial review and the role appellate courts play.[50] Because the trial court properly considered all the relevant facts and the trial court was the finder of fact, it was improper for the appellate court to have conducted its own finding of fact determination on review.[51] Justice Donnelly would have upheld the decision of the trial court but on the grounds that the trial court properly considered all the

40. *Id.*
41. *Id.*
42. *Id.*
43. *Hairston*, 156 Ohio St.3d at 368.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 369.
48. *Hairston*, 156 Ohio St.3d at 369.
49. *Id.*
50. *Id.*
51. *Id.* at 370.

relevant factors and the appellate court failed to defer to the trial court's factual findings.[52]

C. Dissenting Opinion by Justice O'Connor

The dissenting opinion by Justice O'Connor held that the facts, which were known to the officers at the time, did not support a reasonable suspicion to stop Hairston.[53] The dissent focused on some apparent discrepancies between the testimony of Officer Moore at trial and the facts asserted in his police report.[54] The report only indicated that the officers identified the sound of the gunshots as coming from a location west of their position.[55] The specificity of the sounds coming from a location which was close to their position and from the direction of the school were apparently only asserted from the testimony of Officer Moore at trial.[56] Justice O'Connor also noted that Officer Moore did not begin to pat down Hairston until after Hairston's hands were behind his back.[57] Justice O'Connor concluded that at the time the pat down began, a forcible stop had already occurred, therefore reasonable suspicion was required to stop Hairston before that particular point.[58]

The standard for a Terry stop, as described by Justice O'Connor, is that an "officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [an] intrusion."[59] Justice O'Connor's primary concern with the majority opinion is that the standard set forth by the majority lowers the standard for reasonable suspicion in a Terry stop.[60] She points out that when gunshots are involved, the officer must have "believed that the gunshots were fired in the immediate vicinity of the hearer such that the shooter would not have had time to flee prior to arrival of the officer."[61] Justice O'Connor was not satisfied that Officer Moore adequately identified the location and proximity requirements in his testimony to support a reasonable suspicion that Hairston was the individual who fired the shots or would have information as to who did.[62] Hairston, as far as the Justice was concerned, could not have been distinguished from a law-abiding citizen walking in a crosswalk based on the

52. *Id.* at 371.
53. *Hairston*, 156 Ohio St.3d at 371.
54. *Id.* at 372.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Hairston*, 156 Ohio St.3d at 372.
59. *Id.* at 373 (quoting *Terry*, 392 U.S. at 21).
60. *Id.* at 374.
61. *Id.*
62. *Id.*

facts which were available to the officers at the time of the stop.[63] Justice O'Connor determined that Hairston's Fourth Amendment rights had been violated and would have affirmed the Tenth District's holding.[64]

D. Dissenting Opinion by Justice Stewart

The final dissent by Justice Stewart shared similar concerns as Justice O'Connor, about the majority lowering the standard for reasonable suspicion in a *Terry* stop to a point below constitutional requirements.[65] Justice Stewart is additionally concerned that the majority opinion creates a gunfire exception to the reasonable suspicion requirement.[66] His focus was on the particularized suspicion that the officers had of whether Hairston was the one who fired the gunshots.[67] The dissent stated that "an officer conducting such a stop 'must be able to point to specific and articulable facts which, taken together with rational inferences,' . . . show 'a particularized and objective basis for suspecting the particular person stopped of criminal activity."[68] Justice Stewart pointed out that the trial court judge explicitly stated in the record "what's a reasonable suspicion probably varies from one individual to the next."[69] Such a statement clearly violated the objective standard for reasonable suspicion in the Justice's opinion and would have been enough in itself to reverse the holding of the trial court on the motion to suppress.[70]

Additionally, Justice Stewart did not find a basis for a particularized reasonable suspicion to stop Hairston.[71] Most importantly, there were no facts which specifically tied Hairston to the crime of firing the gunshots which was known to the officers prior to the stop.[72] Officer Moore had stated in his testimony that he did not recall seeing other people or vehicles in the area but was not able to say definitively that Hairston was the only person in the area.[73] Justice Stewart also pointed out that this area was a densely populated neighborhood.[74] Finally, Justice Stewart disputed the majority's holding that the appellate court viewed the facts in isolation of each other.[75] He reviewed the findings and considerations of the appellate court and determined that they had correctly considered all the relevant facts under the

63. *Hairston*, 156 Ohio St.3d at 376.
64. *Id.* at 377.
65. *Id.*
66. *Id.*
67. *Id.* at 378.
68. *Hairston*, 156 Ohio St.3d at 378 (internal citations omitted).
69. *Id.* at 379.
70. *Id.*
71. *Id.* at 381.
72. *Id.*
73. *Hairston*, 156 Ohio St.3d at 381.
74. *Id.*
75. *Id.* at 383.

totality of the circumstances and had correctly focused its analysis on whether any of the facts supported a finding of particularized reasonable suspicion into Hairston's conduct.[76]

Justice Stewart concluded by taking issue with the blanket gunfire exception to the Fourth Amendment standard that he believes is contained in the majority opinion.[77] He specifically points to a quote from Justice Ginsburg in *Florida v. J.L.* stating, in response to an argument that the United States should adopt a "firearm exception" to the *Terry* analysis, "[w]e decline to adopt this position. . . an automatic firearm exception to our established reliability analysis would rove too far."[78] Justice Stewart uses this statement to support his position that a gunshot exception to the *Terry* analysis has already been considered by the Supreme Court of the United States and has been rejected.[79] Justice Stewart would have therefore upheld the holding of the Tenth District.[80]

IV. EVALUATION AND ANALYSIS

A. Introduction

State v. Hairston was an incorrectly decided case. The standard for reasonable suspicion in a *Terry* stop is clearly set forth in *Terry v. Ohio* and the majority fails to recognize this standard in *Hairston*.[81] In its opinion, the majority essentially adopts a gunfire exception to the *Terry* analysis.[82] Such an expansive exception to the reasonable suspicion standard has previously been considered by the Supreme Court of the United States, which they have explicitly denied creating such an exception.[83] The holding in *Hairston* removes some of the Fourth Amendment protections afforded to American citizens and makes it more likely that citizens will be subject to unreasonable searches and seizures in the future.[84]

76. *Id.*
77. *Id.* at 386.
78. *Hairston* at 386-87.
79. *Id.*
80. *Id.* at 387-88.
81. Terry v. Ohio, 392 U.S. 1 (1968).
82. *Hairston*, 156 Ohio St.3d at 377.
83. *Id.* at 386-87.
84. *Id.* at 371.

B. Discussion

1. Review of Terry v. Ohio

Terry v. Ohio was a criminal case which made its way to the Ohio Supreme Court, and then to the Supreme Court of the United States.[85] Terry was convicted of carrying a concealed weapon after being searched by Officer McFadden.[86] On October 30, 1963, Officer McFadden was on patrol in plain clothes in downtown Cleveland, Ohio.[87] Officer McFadden observed Terry and Chilton standing about 300 to 400 feet away from a storefront.[88] Officer McFadden observed these men for approximately 10-12 minutes and watched as they made several trips back an forth from the storefront.[89] McFadden testified that their behavior was indicative of "casing a job" or "a stick up" and that he felt it was his duty to investigate and confront them.[90] He also testified that he feared they might have a gun.[91] When Officer McFadden approached Terry and Chilton, McFadden grabbed Terry and patted down the outside of his clothing, searching for weapons.[92] The search revealed that Terry had a revolver in his overcoat breast pocket and a search of Chilton revealed that he also had a revolver in his overcoat.[93] Both Terry and Chilton were then charged with carrying concealed weapons.[94] The trial court held that while Officer McFadden did not have probable cause to arrest either suspect before he patted them down, on the basis of his experience, McFadden "had reasonable cause to believe that the defendants were conducting themselves suspiciously," and purely for his own protection, "the officer had the right to pat down the outer clothing of these men."[95]

The Supreme Court of the United States ultimately affirmed the decision on the trial court.[96] The Supreme Court was concerned with two competing interest at play in the case: one being the desirability of searching suspicious individuals and preventing criminal activity, and the other being the protections provided to citizens by the Fourth Amendment as well as its deterrent effect of constitutional abuses by police officers when detaining suspects.[97] The Supreme Court conceded that there is no distinction between

85. *Terry*, 392 U.S. 1.
86. *Id.* at 7.
87. *Id.* at 5.
88. *Id.*
89. *Id.* at 6.
90. *Terry*, 392 U.S. at 6.
91. *Id.*
92. *Id.* at 7.
93. *Id.*
94. *Id.*
95. *Terry*, 392 U.S. at 8.
96. *Id.* at 31.
97. *Id.* at 10-12.

a "search" and a "frisk" in regard to constitutional protections, and that Terry was indeed subject to a search here.[98] Rather, the inquiry that the Supreme Court considers dispositive was whether Officer McFadden's actions were reasonable and reasonably related to the circumstances which justified the search.[99]

The rule adopted by the Supreme Court under *Terry* was that, "in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[100] Additionally, the Supreme Court stated that "it is imperative that the facts be judged against an objective standard."[101] Simple, subjective good faith by the officer making the arrest is not enough to justify conducting an investigative search.[102] Under this standard, the Court considered Officer McFadden's suspicion and immediate interest of personal security in searching a suspect for weapons on his person.[103] In looking at the facts of the case, the Supreme Court then considered Officer McFadden's experience and the personal observations he had made of the suspects' behavior and determined that he had a reasonable suspicion to justify searching Terry and Chilton to make sure they were not armed with weapons that could harm him.[104] The Supreme Court emphasized the rigid limitations of its holding by stating:

> We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.[105]

98. *Id.* at 19.
99. *Id.* at 19-20.
100. *Terry*, 392 U.S. at 21.
101. *Id.*
102. *Id.* at 22.
103. *Id.* at 23.
104. *Id.* at 30.
105. *Terry*, 392 U.S. at 30.

Terry repeatedly stated that the major concern which allows a police offer to conduct a search based on reasonable suspicion is to protect themselves and others from a potentially armed suspect.[106]

2. Justice Stewart correctly identifies that there is no gunfire exception support by the standard set forth in Terry.

In light of the limited scope of the holding addressed in the *Terry* decision, the majority in *Hairston* lowers the standard for reasonable suspicion below that which was originally intended.[107] The majority begins by pointing out the fact that there are two separate standards for police officers to stop and search an individual: probable cause for a traditional arrest and reasonable suspicion for an investigative, or the *Terry* stop.[108] A traditional arrest has been defined by the Ohio Supreme Court as occurring when four elements are met: (1) An intent to arrest, (2) under a real or pretended authority, (3) accompanied by an actual or constructive seizure or detention of the person, and (4) which is so understood by the person arrested.[109] While it is well settled that probable cause is necessary to arrest a suspect, there is no concrete definition for what constitutes probable cause.[110] "Probable cause must be viewed from the vantage point of a prudent, reasonably cautious police officer on the scene at the time of the search guided by his or her experience and training."[111] Probable cause for search exists where the facts and circumstances, which are known to an officer at the time of arrest, are sufficient to justify a belief that a crime has been or is being committed.[112] The legal encyclopedia explicitly states that the standard for probable cause is more demanding than that for reasonable suspicion.[113]

The requirement for a finding of probable cause before initiating an arrest is to ensure a suspect's rights are not violated under the Fourth Amendment of the U.S. Constitution.[114] Given the importance of protecting citizens from unwarranted searches and seizures, *Terry* was meant to be a narrow case, with limited application and primary purpose of ensuring officers' safety.[115] The Supreme Court of the United States has rejected opportunities to expand the

106. *Id.* at 29.
107. *Hairston*, 156 Ohio St.3d at 374.
108. *Id.* at 365-66.
109. State v. Barker, 53 Ohio St.2d 135, 139 (1978).
110. 25 Ohio Jur. 3d Criminal Law: Procedure § 145
111. *Id.*
112. *Id.*
113. *Id.*
114. *Terry*, 392 U.S. at 8.
115. *Id.* at 29.

Terry standard of reasonable suspicion any lower.[116] In Justice Stewart's dissenting opinion in *Hairston*, he cited to Justice Ginsburg specifically rejecting the conclusion reached by the majority.[117] Justice Ginsburg was concerned that a bare bones suspicion that a person has firearm on them would become an exception that swallows the rule.[118] This concern is shared by both Justice Stewart and Justice O'Connor in that the majority in *Hairston* created a standard that, if an officer hears gunfire, he is at license to search anyone in the area that he thinks the sound originated.[119] Justice Stewart correctly observes that the majority effectively created a gunfire exception in its holding, in violation of precedent set by the Supreme Court of the United States.[120]

3. Effect of the Decision

The holding in *Hairston* erodes the constitutional protections provided to American citizens under the Fourth Amendment.[121] The decision in *Terry*, while lowering the standard for an officer to conduct a search of a suspect for weapons, was meant to be limited in its scope and application.[122] Fourth amendment protection cases are often difficult to defend because they involve individuals who are unsympathetic in some regard.[123] Additionally, excluding evidence gathered from an unconstitutional search can offend some juries' sense of justice.[124] Nonetheless, protections against unwarranted searches and seizures are essential to preserving a free people and the majority in *Hairston* does a disservice to Ohioans by removing some of those protections.

V. CONCLUSION

The Fourth Amendment is a constitutional guarantee that citizens will be free from unreasonable searches and seizures.[125] The Supreme Court in *Terry* identified a limited and narrow exception to the probable cause requirement for a traditional arrest of a reasonable suspicion basis for an investigative stop.[126] Even then, such a stop was meant to be limited to the interest of

116. Fla. v. J.L., 529 U.S. 266 (2000).
117. *Hairston*, 156 Ohio St.3d at 386-87.
118. *J.L.*, 529 U.S. at 273.
119. *Hairston*, 156 Ohio St.3d at 374, 381.
120. *Id.* at 387.
121. *Id.* at 376-77.
122. *See supra*, Part IV.B(1).
123. *Amendment 4- Searches and Seizure*, AUTHENTICATED U.S. GOVERNMENT INFORMATION, 1446 (2014).
124. *Amendment 4- Searches and Seizure*, at 1452.
125. U.S. Const. amend IV.
126. *See supra*, Part IV.B(1).

protecting police officers from being harmed with weapons that a suspect may have on his person.[127] The majority in *Hairston* incorrectly found that Officer Moore had a reasonable suspicion to stop Hairston because he could not identify any facts that would lead to a particularized suspicion that Hairston was engaged in a crime.[128] In the interest of preserving the liberties of Ohio citizens, the majority opinion will hopefully remain an outlier in the line of *Terry* stop jurisprudence and the dissenters' opinions will prevail.

SCOTT SMITH

127. *Terry*, 392 U.S. at 29.
128. *Hairston*, 156 Ohio St.3d at 371.