Of all the police field operations that deter and thwart crime and result in the apprehension of criminals, the investigative detention is, by far, the most commonplace. After all, detentions occur at all hours of the day and night and in virtually every imaginable public place, including streets, sidewalks, parks, parking lots, schools, shopping malls, and international airports. They take place in business districts and in “nice” neighborhoods, but mostly in areas that are blighted and beset by parolees, street gangs, drug traffickers, or derelicts.

The outcome of detentions will, of course, vary. Some result in arrests. Some provide investigators with useful—often vital—information. Some are fruitless. All are dangerous. To help reduce the danger and to confirm or dispel their suspicions, officers may do a variety of things. For example, they may order the detainee to identify himself or herself, stand or sit in a certain place, and state whether he or she is armed. Under certain circumstances, they may pat search the detainee or conduct a protective search of the detainee’s car. If they believe a crime was recently committed that was witnessed by someone, they might conduct a field showup. To determine if the detainee is wanted, they will usually run a warrant check. If they cannot develop probable cause, they will sometimes complete a field contact card for inclusion in a database or for referral to detectives. But, for the most part, officers will try to confirm or dispel their suspicions by asking questions.

Because detentions are so useful to officers and beneficial to the community, it might seem odd that they did not exist—at least not technically—until 1968. That’s when the U.S. Supreme Court ruled in the landmark case of Terry v. Ohio1 that officers who lack probable cause to arrest can detain a suspect temporarily if they have a lower level of proof known as “reasonable suspicion.”2

In reality, however, law enforcement officers throughout the country had been stopping and questioning suspected criminals long before 1968. Terry marks the point at which the Court ruled that this procedure is constitutional, and also set forth the rules under which detentions must be conducted.

What are those rules? They can be divided into two broad categories:

1. **Grounds to detain:** Officers must have had sufficient grounds to detain the suspect; that is, reasonable suspicion.

2. **Procedure:** The procedures that officers utilize to confirm or dispel their suspicion and to protect themselves must be objectively reasonable.

Taking note of these requirements, the Court in Terry pointed out that “our inquiry is a dual one—whether the officer’s action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.”3

In addition to investigative detentions, there are two other types of temporary seizures. The first (and most common) is the traffic stop. Although traffic stops are technically “arrests” when (as is usually the case) the officer witnesses the violation and, therefore, has probable cause, traffic stops are subject to the same rules as investigative detentions. The other type of detention is known as a “special needs detention,” which is a temporary seizure that advances a community interest other than the investigation of a suspect or a suspicious circumstance.

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1. Terry v. Ohio
2. Terry v. Ohio
3. Terry v. Ohio
Reasonable Suspicion

While detentions constitute an important public service, they are also a “sensitive area of police activity” that can be a “major source of friction” between officers and the public. That is why law enforcement officers are permitted to detain people only if they are aware of circumstances that constitute reasonable suspicion. In the words of the U.S. Supreme Court, “An investigative stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.”

Reasonable suspicion is similar to probable cause in that both terms designate a particular level of suspicion. They differ, however, in two respects. First, while probable cause requires a “fair probability” of criminal activity, reasonable suspicion requires something less, something that the Court recently described as a “moderate chance.” Or, to put it another way, reasonable suspicion “lies in an area between probable cause and a mere hunch.” Second, reasonable suspicion may be based on information that is not as reliable as the information needed to establish probable cause. Again quoting the Court:

Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable.

Although the circumstances that justify detentions are varied, reasonable suspicion ordinarily exists if officers can articulate one or more specific circumstances that reasonably indicate, based on common sense or the officers’ training and experience, that criminal activity is occurring and that the person to be stopped is engaged in that activity. Thus, officers “must be able to articulate something more than an inchoate and unperticularized suspicion or hunch.” This does not mean that officers must have direct evidence that connects the suspect to a specific crime. On the contrary, it is sufficient that the circumstances are merely consistent with criminal activity.

General Principles

The propriety of the officers’ conduct throughout detentions depends on two things. First, they must restrict their actions to those that are reasonably necessary to (1) protect themselves, and (2) complete their investigation. Second, even if the investigation is properly focused, a detention will be invalidated if the officers do not pursue their objectives in a prudent manner. Thus, the Ninth Circuit pointed out that “the reasonableness of a detention depends not only on if it is made, but also on how it is carried out.”

Although officers are allowed a great deal of discretion in determining how best to protect themselves and conduct their investigation, the fact remains that detentions are classified as “seizures” under the Fourth Amendment, which means they are subject to the constitutional requirement of objective reasonableness. For example, even if a showup is reasonably necessary, a detention may be deemed unlawful if the officers are not diligent in arranging for the witness to view the detainee. Similarly, even if a legitimate need exists for additional officer-safety precautions, a detention may be struck down if the officers do not limit their actions to those that are reasonably necessary under the circumstances.

De Facto Arrests. A detention that does not satisfy one or both of these requirements may be invalidated in two ways. First, it will be deemed a de facto arrest if the safety precautions are excessive, if the detention is unduly prolonged, or if the detainee is unnecessarily transported from the scene. While de facto arrests are not unlawful per se, they will be upheld only if the officers have probable cause to arrest. As the Fifth Circuit noted in United States v. Shabazz, “A prolonged investigative detention may be tantamount to a de facto arrest, a more intrusive custodial state which must be based upon probable cause rather than mere reasonable suspicion.”

Unfortunately, the term “de facto arrest” may be misleading because it can be interpreted to mean that an arrest results whenever the officers’ actions are more consistent with an arrest than a detention; for example, handcuffing. But, arrest-like actions can result in a de facto arrest only if they are not reasonably necessary.

In many cases, of course, the line between a detention and de facto arrest is difficult to detect. As the Seventh Circuit observed in U.S. v. Tilmon, “Subtle, and perhaps tenuous, distinctions exist between a Terry stop, a Terry stop rapidly evolving into an arrest, and a de facto arrest.” So, in “borderline” cases—meaning cases in which the detention “has one or two arrest-like features but otherwise is arguably consistent with a Terry stop”—the assessment “requires a fact-specific inquiry into whether the measures used were reasonable in light of the circumstances that prompted the stop or that developed during its course.”

In addition, even if a detention does not resemble an arrest, it may be invalidated on grounds that the officers investigated matters for which reasonable suspicion does not exist; or if they do not promptly release the suspect when they realize that their suspicions are unfounded or that they are unable to confirm them.

Totality of Circumstances. In determining whether the officers acted in a reasonable manner, the courts will consider the totality of circumstances, not just those that might warrant criticism. Thus, the First Circuit pointed out, “A court inquiring into the validity of a Terry stop must use a wide lens.”

Common Sense. Officers and judges are expected to evaluate the surrounding circumstances in light of common sense, not hypertechnical analysis. In the words of the U.S. Supreme Court, “Much as a ‘bright line’ rule would be desirable, in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria.”

Training and Experience. A court may consider the officers’ interpretation of the circumstances based on their training and experience. For example, the detainee’s movements and speech will sometimes indicate to trained officers that he or she is about to fight or run.

No “Least Intrusive Means” Requirement. There are several appellate decisions on the books in which the courts said or implied that a detention will be invalidated if the officers fail to utilize the “least intrusive means” of conducting their investigation and protecting themselves. In no uncertain terms, however, the U.S. Supreme Court ruled that the mere existence of a less intrusive alternative is immaterial. As the
Court explained in *U.S. v. Sharpe*, “The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it.”22 The Court added that, in making this determination, judges must keep in mind that most detentions are “swiftly developing” and that judges “can almost always imagine some alternative means by which the objectives of the police might have been accomplished.”

**Developments after the Stop.** The courts understand that detentions are not static events, and that the reasonableness of the officers’ actions often depends on what happens as things progress, especially whether the officers reasonably become more or less suspicious, or more or less concerned for their safety.21 For example, in *U.S. v. Sowers* the court noted the following:

> Based on unfolding events, the trooper’s attention shifted away from the equipment violations that prompted the initial stop toward a belief that the detainees were engaged in more serious skulduggery. Such a shift in focus is neither unusual nor impermissible.24

Similarly, the Seventh Circuit said that “[o]fficers faced with a fluid situation are permitted to graduate their responses to the demands of the particular circumstances confronting them.”25

**Detentions Based on Reasonable Suspicion Plus.** Before moving on, it should be noted that some courts have sought to avoid the problems that often result from the artificial distinction between lawful detentions and de facto arrests by simply permitting more intrusive actions when there is a corresponding increase in the level of suspicion. In one such case, *U.S. v. Tilmon*, the court explained:

> [W]e have adopted a sliding scale approach to the problem. Thus, stops too intrusive to be justified by suspicion under Terry, but short of custodial arrest, are reasonable when the degree of suspicion is adequate in light of the degree and the duration of restraint.26

In another case, *Lopez Lopez v. Aran*, the First Circuit said that “where the stop and interrogation comprise more of an intrusion, and the government seeks to act on less than probable cause, a balancing test must be applied.”27

**Using Force to Detain**

If a suspect refuses to comply with an order to stop, officers may of course use force to accomplish the detention. As the Ninth Circuit explained in *U.S. v. Thompson*:

> A police officer attempting to make an investigatory detention may properly display some force when it becomes apparent that an individual will not otherwise comply with his [or her] request to stop, and the use of such force does not transform a proper stop into an arrest.28

How much force is permitted? All that can really be said is that officers may use the amount that a “reasonably prudent” officer would believe necessary under the circumstances.29

Note that in most cases in which force is reasonably necessary, the officers will have probable cause to arrest the detainee for resisting, delaying, or obstructing. If so, it would be irrelevant that the detention has become a de facto arrest.

**Officer Safety Precautions**

It is “too plain for argument,” said the U.S. Supreme Court, that officer safety concerns during detentions are “both legitimate and weighty.”23 “This is largely because the officers are ‘particularly vulnerable’ since ‘a full custodial arrest has not been effected, and the officer must make a ‘quick decision as to how to protect himself and others from possible danger.’”231

Sometimes the danger is apparent, as when the detainee is suspected of having committed a felony, especially a violent felony or one in which the perpetrators are armed.2 Or it may be the detainee’s conduct that indicates he or she presents a danger; for example, the detainee refuses to comply with an officer’s order to keep his or her hands in sight, is extremely jittery, or won’t stop moving around.33

Then there are situations that are dangerous but the officers don’t know how dangerous.34 For example, they may be unaware that the detainee is wanted for a felony or that he or she possesses evidence that would send him or her to prison if it is discovered. Thus, in *Arizona v. Johnson*, a traffic stop case, the U.S. Supreme Court noted that the risk of a violent encounter “stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop.”335

It is noteworthy that, in the past, it was sometimes argued that any officer safety precaution was too closely associated with an arrest to be justified by anything less than probable cause. But, as the Seventh Circuit commented, that has changed, thanks to the swelling ranks of armed and violence-prone criminals:

> [W]e have over the years witnessed a multifaceted expansion of Terry. For better or for worse, the trend has led to the permitting of the use of handcuffs, the placing of suspects in police cruisers, the drawing of weapons and other measures of force more traditionally associated with arrest than with investigative detention.36

Thus, officers may now employ any officer safety precautions that are reasonably necessary under the circumstances—with emphasis on the word “reasonably.”37 The Ninth Circuit put it this way: “[W]e allow intrusive and aggressive police conduct without deeming it an arrest in those circumstances when it is a reasonable response to legitimate safety concerns on the part of the investigating officers.”38 Or in the words of the Fifth Circuit:

> [P]ointing a weapon at a suspect, ordering a suspect to lie on the ground, and handcuffing a suspect—whether singly or in combination—do not automatically convert an investigatory detention into an arrest [unless] the police were unreasonable in failing to use less intrusive procedures to conduct their investigation safely.39

**Keep Hands in Sight.** Commanding a detainee to keep his or her hands in sight is so minimally intrusive that it is something that officers may do as a matter of routine.

**Officer-Safety Questions.** Officers may ask questions that are reasonably necessary to determine if, or to what extent, a detainee constitutes a threat—provided the questioning is
brief and to the point. For example, officers may ask the detainee if he or she has any weapons or drugs in his possession, or if he or she is on probation or parole.50

**Controlling Detainees’ Movements.** For their safety (and also in order to carry out their investigation efficiently), officers may require the detainee to stand or sit in a particular place.

**Lie on the Ground.** Ordering a detainee to lie on the ground is much more intrusive than merely ordering him or her to sit on the curb. Consequently, such a precaution cannot be conducted as a matter of routine but, instead, is permitted only if there is some justification for it.51

**Pat Searching.** Officers may pat search a detainee if they reasonably believe that he or she is armed or otherwise presents a threat to officers or others. Although the courts routinely say that officers must reasonably believe that the detainee is armed and dangerous, either is sufficient. This is because it is apparent that a suspect who is armed with a weapon is necessarily dangerous to any officer who is detaining him or her, even if he or she is cooperative and exhibits no hostility.42 For example, pat searches are permitted whenever officers reasonably believe that the detainee committed a crime in which a weapon was used, or a crime in which weapons are commonly used, such as drug trafficking. A pat search is also justified if officers reasonably believe that the detainee poses an immediate threat, even if there is no reason to believe he or she is armed.43

**Handcuffing.** Although handcuffing “minimizes the risk of harm to both officers and detainees,”44 it is not considered standard operating procedure.45 Instead, it is permitted only if there is reason to believe that physical restraint is warranted.46

What circumstances tend to indicate that handcuffing is reasonably necessary? The following are examples:

- Detainee refuses to keep his or her hands in sight.47
- Detainee keeps reaching inside his or her clothing.48
- Detainee pulls away from officers.49
- Detainee appears ready to flee.50
- Detainee is hostile.51
- Onlookers are hostile.52
- Officers have reason to believe the detainee is armed.53
- Officers have reason to believe the detainee committed a felony, especially one involving violence or weapons.54
- Officers are outnumbered.55
- Detainee is transported to another location.56

Three other points to consider follow. First, if there is reason to believe that handcuffing is necessary, it is immaterial that officers have previously pat searched the detainee and did not detect a weapon.

Second, in close cases it is relevant that the officers tell the detainee that, despite the handcuffs, he or she is not under arrest and that the handcuffs are only a temporary measure for everyone’s safety.57

Third, even if handcuffing is necessary, it may convert a detention into a de facto arrest if the handcuffs are applied for an unreasonable length of time,58 or if they are applied more tightly than necessary. As the Seventh Circuit put it, “[A]n officer may not knowingly use handcuffs in a way that will inflict unnecessary pain or injury on an individual who presents little or no risk of flight or threat of injury.”59 Similarly, the Ninth Circuit observed that “no reasonable officer could be‐lieve that the abusive application of handcuffs was constitutional.”60

**Warrant Checks.** Because wanted detainees necessarily pose an increased threat, officers may run warrant checks as a matter of routine.

**Protective Car Searches.** When a person is detained in or near his car, a gun or other weapon in the vehicle can be just as dangerous to the officers as a weapon in his waistband. Consequently, the U.S. Supreme Court ruled that officers may look for weapons inside the passenger compartment if they reasonably believe that a weapon—even a “legal” one—is located there.61 Note that a protective vehicle search may be conducted even though the detainee is handcuffed or is otherwise restrained.62

**Detention at Gunpoint.** Although a detention at gunpoint is a strong indication that the detainee is under arrest, the courts have consistently ruled that such a safety measure does not require probable cause if, (1) the precaution is reasonably necessary, and (2) the weapon is reholstered after it was safe to do so.63 Said the Fifth Circuit, “[I]n and of itself, the mere act of drawing or pointing a weapon during an investigatory detention does not cause it to exceed the permissible grounds of a Terry stop or to become a de facto arrest.”64 The Seventh Circuit put it this way:

> Although we are troubled by the thought of allowing policemen to stop people at the point of a gun when probable cause to arrest is lacking, we are unwilling to hold that [a detention] is never lawful when it can be effectuated safely only in that manner. It is not nice to have a gun pointed at you by a policeman but it is worse to have a gun pointed at you by a criminal.65

For instance, in United States v. Watson, a detainee argued that, even though the officers reasonably believed that he was selling firearms illegally, they “had no right to frighten him by pointing their guns at him.” The court responded, “The defendant’s case is weak; since the police had reasonable suspicion to think they were approaching an illegal seller of guns who had guns in the car, they were entitled for their own protection to approach as they did.”66

**Felony Car Stops.** When officers utilize felony car stop procedures, they usually have probable cause to arrest one or more of the occupants of the vehicle, so they seldom need to worry about the intrusiveness of felony stops. But the situation is different if officers have only reasonable suspicion. Specifically, they may employ felony stop measures only if they have direct or circumstantial evidence that one or more of the occupants presents a substantial threat of imminent violence.

Felony extraction procedures may also be used on all passengers in a vehicle at the conclusion of a pursuit, even though officers have no proof that the passengers are involved in the crime that prompted the driver to flee. For instance, in Allen v. City of Los Angeles, a passenger claimed that a felony stop was unlawful “because he attempted to persuade [the driver] to pull over and stop.” That’s “irrelevant,” said the court, because the officers “could not have known the extent of [the passenger’s] involvement until after they questioned him.”67

**Utilizing Electronic Control Devices/Tasers.** Officers may employ an electronic control device against a detainee if the detainee “poses an immediate threat to the officer or a member of the public.”68 Having stopped the detainee, and having
taken appropriate officer safety precautions, officers will begin their investigation into the circumstances that generated reasonable suspicion.

Acknowledgment

This Training Key® was adapted with permission from an article written by Mark Hutchins, Senior Deputy District Attorney for the Alameda County (CA) District Attorney’s Office. The article was originally published in the Spring 2010 edition of Point of View, a publication of the Alameda County District Attorney’s Office.

Endnotes

1 Terry v. Ohio, 392 U.S. 1 (1968).
2 See Florida v. Royer 460 U.S. 491, 498 (1983). “Prior to Terry v. Ohio, any restraint on the person amounting to a seizure for the purposes of the Fourth Amendment was invalid unless justified by probable cause.”
3 Terry, 392 U.S. at 19-20.
4 Id. at 9.
7 U.S. v. Fascha, 520 F.3d 694, 697 (7th Cir. 2008).
11 Meredith v. Erath, 342 F.3d 1097, 1062 (9th Cir. 2003).
12 U.S. v. Shabazz, 993 F.2d 431, 436 (5th Cir. 1993).
13 See Gavrich v. Knapp, 319 F.3d 1115, 1125 (9th Cir. 2003). “The officers should have recognized that the manner in which they conducted the seizure was significantly more intrusive than was necessary.”
14 U.S. v. Acosta Colon, 157 F.3d 9, 17 (1st Cir. 1998). “This assessment requires a fact-specific inquiry into whether the measures used were reasonable in light of the circumstances that prompted the stop or that developed during its course.”
15 Note: In the past, the U.S. Supreme Court suggested that a detention may be deemed a de facto arrest regardless of whether the officers’ actions were reasonably necessary. See, for example Florida v. Royer, 460 U.S. 491, 499 (1983), (plurality decision) “Not may the police seek to verify their suspicions by means that approach the conditions of arrest.” However, even if officers handcuffed the suspect or detained him at gunpoint (both quintessential indications of an arrest), a de facto arrest will mean that approach the conditions of arrest.” However, even if officers handcuffed the suspect.
16 U.S. v. Taylor, 716 F.2d 701, 709 (9th Cir. 1983). detainee was “extremely verbally abusive” and “quite rowdy”; U.S. v. Buffett, 815 F.2d 1292, 1300 (9th Cir. 1987). detainee “had been charged in the ambush slaying of a police officer and with attempted murder.” U.S. v. Jacobs, 715 F.2d 1345, 1345 (9th Cir. 1983). ordering bank robbery suspects to “prove out” was justified; and U.S. v. Santos, 939 F.2d 1479, 1496 (11th Cir. 1991). detainees were “uncooperative” and intoxicated, one was “unruly and verbally abusive,” officer was alone, it was late at night; and U.S. v. Sanders 994 F.2d 200, 207 (5th Cir. 1993). “Ordering a person whom the police reasonably believe to be armed to lie down may well be within the scope of an investigatory detention.”
17 See Terry, 393 U.S. at 28. Mims, 434 U.S. at 112.
18 See Long, 463 U.S. at 1049. “The protection of law and order may be justified by probable cause.”
19 See Terry, 393 U.S. at 28, Minn, 434 U.S. at 112.
20 Reasonable suspicion “could as readily be described as a moderate chance of finding evidence for the commission of a crime.”
21 See Florida v. Royer, 460 U.S. 491, 498 (1983). “Prior to Terry v. Ohio, any restraint on the person amounting to a seizure for the purposes of the Fourth Amendment was invalid unless justified by probable cause.”
22 See Florida v. Royer, 460 U.S. 491, 498 (1983). “Prior to Terry v. Ohio, any restraint on the person amounting to a seizure for the purposes of the Fourth Amendment was invalid unless justified by probable cause.”
24 See Florida v. Royer, 460 U.S. 491, 498 (1983). “Prior to Terry v. Ohio, any restraint on the person amounting to a seizure for the purposes of the Fourth Amendment was invalid unless justified by probable cause.”
questions

The following questions are based on material in this Training Key®. Select the one best answer for each question. Editor's Note: State constitutions and rulings may impose a higher standard of care or restrictions in legal procedures greater than that required under federal law. Officers should ensure that their state law is consistent with information contained in this and the following Training Key® on this topic.

1. In order to be considered valid, an investigative detention must be supported by probable cause.
   (a) True
   (b) False

2. Officer safety is a primary concern during investigative detentions. As such, officers are permitted to do which of the following?
   (a) Pat search a detainee if there is reason to believe that he or she is armed or otherwise presents a threat.
   (b) Physically restrain the detainee using handcuffs without any restrictions.
   (c) Require the detainee to sit or stand in a particular place.
   (d) a and c

3. Which of the following statements is false?
   (a) Officer’s use of handcuffs to secure a suspect during an investigative detention converts the stop into a de facto arrest.
   (b) Officers may draw a firearm during an investigative detention if reasonably necessary without turning the detention into a de facto arrest.
   (c) The pat search of a detainee is permissible if there is reasonable belief that the detainee is armed.
   (d) In determining whether an officer acted properly during an investigative detention, courts will base their decision on the totality of the circumstances.

answers

1. (b) Investigative detentions must be supported by a lesser burden of proof known as reasonable suspicion. Reasonable suspicion is defined as a “moderate chance” of criminal activity and can be supported by information that is less reliable than that necessary for probable cause.
2. (d) The use of handcuffs is governed by various restrictions. For example, handcuffs may not be used for an unreasonable amount of time and cannot be too tight. In addition, officers should inform the detainee that he or she is not under arrest and that the handcuffs are only being used as a temporary safety measure.
3. (a) If the use of handcuffs is reasonable under the circumstances to protect the officer or others, it does not necessarily convert a detention into a de facto arrest.

have you read......?


This Training Key® is a compilation of basic federal legal guidelines for making arrests. All police officers should understand and follow these laws in addition to individual state laws governing arrest.