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Case Notes

SEARCH AND SEIZURE—AIRPORTS—Search of Two Defendants and Seizure of Heroin Did Not Violate Fourth Amendment Rights Since the Search and Seizure Were Reasonable in Light of the Threat of Hijacking. *United States v. Legato*, 480 F.2d 408 (5th Cir. 1973).

The Federal Bureau of Investigation in Miami, Florida, received an anonymous telephone call advising that an orange bag containing a bomb would be placed aboard a Delta Air Lines flight to Chicago.¹ Defendant Legato purchased a ticket on the flight mentioned by the anonymous caller and, carrying an orange shopping bag, proceeded to the boarding area accompanied by defendant Migdall. After the defendants were seated in the boarding area, Delta officials announced that there had been a bomb threat and instructed passengers to reclaim their baggage for a search. Migdall left the airport with the orange bag and went to the parking lot, while Legato remained in the boarding area with the other passengers to be searched. Both men were taken into custody. After detaining the two men for custodial interrogation, an FBI agent searched the bag Migdall had been carrying and discovered that it contained heroin. The trial court found both defendants guilty of drug-related offenses.² *Held, affirmed*: The search and seizure were proper because there was reasonable suspicion, in light of the threat of hijacking, to justify searching and seizing these individuals.³ *United States v. Legato*, 480 F.2d 408 (5th Cir. 1973).

¹ The anonymous informant identified the specific flight upon which the bomb would be placed and further stated that it would be taken on board in an orange shopping bag. *United States v. Legato*, 480 F.2d 408, 409 (5th Cir. 1973).

² *Id.* The exact charges were:

. . . (1) conspiracy to knowingly and intentionally distribute heroin, a Schedule I controlled substance, 21 U.S.C. § 841 (a) (1); (2) knowingly and intentionally possessing heroin with an intent to distribute, 21 U.S.C. § 841 (a) (1); and (3) knowingly and intentionally attempting to distribute heroin, 21 U.S.C. § 841 (a)(1), 846.

³ In addition to holding the stop and subsequent search valid on the basis of reasonable suspicion, the court reasoned that the search could be upheld by Migdall's voluntary consent to be searched. Police officials did give Migdall *Miranda*

In upholding the conviction, the Fifth Circuit in *Legato* concluded that the stop of Migdall and Legato did not violate their fourth amendment right to be free from unreasonable searches and seizures.⁴ The circuit court determined that the stop was reasonable because police officials considered the defendants possible hijackers.⁵ The police determination was not based upon any criminal hijacking tendencies demonstrated by the defendants; rather, the conclusion that the defendants were potential hijackers was the product of police verification of facts given by the anonymous informant. Following its earlier decision in *United States v. Moreno*,⁶ the Fifth Circuit in *Legato* found that the police had reasonable suspicion under fourth amendment standards to stop the suspected hijackers.

In *Moreno* the Fifth Circuit faced for the first time the problem of reconciling fourth amendment freedoms with the exigency of hijacking. Aware of the danger to crew and passengers as a result of hijacking, the Fifth Circuit held that an airport was a critical area "in which special fourth amendment considerations [applied]."⁷ In applying these special considerations to the test for a reasonable stop and frisk as defined in *Terry v. Ohio*,⁸ the Fifth Circuit has in effect lowered the degree of reasonable suspicion constitutionally required to stop and frisk an individual.⁹

The United States Supreme Court in *Terry* held that governmental officials could stop and frisk, individuals when justified by "reasonable suspicion."¹⁰ Following *Terry*, reasonable suspicion has been found to exist where, at the moment of the stop and frisk, the officer has facts sufficient to enable a man of reasonable caution to believe the stop and frisk appropriate.¹¹ *Terry* does not require that

warnings, but they did not include any warning as to Migdall's fourth amendment right to refuse the search. 480 F.2d 408, 413 (5th Cir. 1973).

The Supreme Court in *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973), in dicta, seems to indicate that when the defendant is in custody, a fourth amendment warning must be related to the defendant. *Id.* at 247-48.

The Fifth Circuit in *Legato* indicates that Migdall was subjected to the degree of custody which would require a fourth amendment warning.

⁴ 480 F.2d at 410.

⁵ *Id.* at 411.

⁶ 475 F.2d 44 (5th Cir. 1973).

⁷ *Id.* at 51.

⁸ 392 U.S. 1 (1968).

⁹ *United States v. Moreno*, 475 F.2d 44 (5th Cir. 1973).

¹⁰ 392 U.S. at 21-22.

¹¹ *Id.* at 22.

the officer have facts showing probable cause to arrest before he may stop and frisk an individual. Rather, when the police officer has drawn a "rational inference" from "articulable facts" that a crime has been or is about to be committed, he may momentarily stop an individual to obtain identification and information.¹² The officer must, however, have facts which are more than "inarticulate hunches" or a subjective good faith belief that the individual has or is about to commit a crime.¹³ Less stringent requirements would subject the existence of the fourth amendment rights to police discretion.¹⁴ Moreover, it is clear that the same facts justifying a stop under the *Terry* standard do not necessarily justify a frisk of the person stopped. A frisk is justified only by the officer's reasonable belief that the person stopped is armed and dangerous.¹⁵ Furthermore, the scope of the search, when justified, is limited to the "exigencies which justify its initiation." The officer may therefore search only for concealed weapons which could be dangerous to the officer or bystanders.¹⁶ Balancing all these considerations, the Supreme Court has said, in effect, that a limited stop and frisk is reasonable under the fourth amendment because the need for effective law enforcement outweighs the invasion of individual rights.

The courts have generally used *Terry's* balancing approach in determining whether or not a particular search and seizure was reasonable.¹⁷ There is, however, an inherent difficulty in applying the

¹² *Id.* at 21.

¹³ *Id.*

¹⁴ *Beck v. Ohio*, 379 U.S. 89, 97 (1964).

¹⁵ *Terry v. Ohio*, 392 U.S. 1, 24 (1968).

¹⁶ *Id.* at 27.

¹⁷ *United States v. Legato*, 480 F.2d 408 (5th Cir. 1973); *United States v. Moreno*, 475 F.2d 44 (5th Cir. 1973); *United States v. Lindsey*, 451 F.2d 701 (3rd Cir. 1971), *cert. denied*, 405 U.S. 995 (1972); *United States v. Meulener*, 351 F. Supp. 1284 (C.D. Cal. 1972); *United States v. Lopez*, 328 F. Supp. 1077 (E.D.N.Y. 1971).

Terry v. Ohio, 392 U.S. 1 (1968), is one of the exceptions to the rule established by *Katz v. United States*, 389 U.S. 347 (1967), and *United States v. Jeffers*, 342 U.S. 48 (1951).

[T]hat searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.

342 U.S. at 51.

The authorities have not, as a general rule, been able to justify stopping suspicious individuals on the basis of any of the other exceptions: as incident to arrest, *Chimel v. California*, 395 U.S. 752 (1969); as involving hot pursuit, *Warden*

Terry standard of reasonableness to the airport situation since in the airport cases the courts must also weigh the exigency of hijacking. As did the Fifth Circuit, most courts have given added consideration to this exigency because of several problems peculiar to hijacking.¹⁸

The Fifth Circuit has noted that “[t]he crime of air piracy exceeds all others in terms of the potential great and immediate harm to others. . . .”¹⁹ Additionally, the skyjacker is frequently a highly disturbed and unpredictable individual with a tendency toward violence²⁰ and the crime takes place aboard an aircraft where any action to apprehend the hijacker would only result in increasing the possibility of harm to the passengers and crew. The hijacker must therefore be stopped while he is still on the ground and before he takes any overt criminal action.²¹ Although the detection process begins in the airport, conditions still favor the hijacker.²² For example, discovering hijackers without disturbing the flow of commercial traffic in a congested airport is a complicated and delicate procedure.²³ Presented with these problems of detecting and the dangers to lives and property caused by hijacking, the courts have held that in airport situations “the level of suspicion for a *Terry* investigative stop and protective search should be lowered.”²⁴ While all courts do not agree as to what lower degree of suspicion will be sufficient, the Fifth Circuit in a case following *Legato* has held that “mere” or unsupported suspicion is sufficient to justify a stop and frisk of an individual when he is in the boarding area of the airport.²⁵

v. Hayden, 387 U.S. 294 (1967); as a danger to imminent destruction of evidence, Schmerber v. California, 384 U.S. 757 (1966); as an offense committed in the presence of an officer, Sibren v. New York, 392 U.S. 40 (1968); or because of contraband in plain view, Harris v. United States, 390 U.S. 234 (1968). However, an attempt is being made by the government to base the search on implied consent, United States v. Ruiz-Estrella, 481 F.2d 723 (2d Cir. 1973); United States v. Skipwith, 482 F.2d 1272 (5th Cir. 1973).

¹⁸ United States v. Skipwith, 482 F.2d 1272, 1275 (5th Cir. 1973); United States v. Slocum, 464 F.2d 1180, 1182 (3d Cir. 1972); United States v. Epperson, 454 F.2d 769, 771 (4th Cir. 1972); United States v. Mitchell, 352 F. Supp. 38, 42 (E.D.N.Y. 1972).

¹⁹ United States v. Moreno, 475 F.2d 44, 48 (5th Cir. 1973).

²⁰ *Id.* at 48.

²¹ *Id.* at 49.

²² *Id.*

²³ *Id.*

²⁴ United States v. Lindsey, 451 F.2d 701, 703 (3d Cir. 1971).

²⁵ United States v. Skipwith, 482 F.2d 1272, 1275 (5th Cir. 1973).

The factual setting of *Legato*, however, differed from the typical airport search and seizure and thus suggests several unique questions. The distinguishing facts in *Legato* include an anonymous informant's igniting the suspicion of police officials, Migdall's being taken into police custody while in the parking lot, and Migdall's being questioned extensively after the initial stop.

The initial stop of a suspect must be "justified by" the circumstances which rendered its initiation permissible.²⁶ To justify the initial stop and interrogation of the defendants under the facts in *Legato*, the authorities' suspicions could be based only upon the informant's tip or the observations of police officials.²⁷ Since the *Legato* informant remained anonymous, however, an additional problem is involved in sanctioning the stop and investigation based on the tip. Where the informant is not known to the officials and has not provided reliable information in the past, the tip must be self-verifying.²⁸

In *Legato* the Fifth Circuit found that the tip was verified by police officials. The circuit court relied largely upon *Adams v. Williams*,²⁹ in which the Supreme Court held that a tip would justify the stop of a suspect where there were other criteria present to give the tip some "indicia of reliability."³⁰ The Supreme Court also indicated that one such criterion would be self-verification of the tip.³¹ In *Adams*, however, the Supreme Court was less concerned with self-verification because the informant was known to police officials and had supplied some information in the past.³² In fact, the Supreme Court in *Adams* did not speak to the required "indicia of reliability" if the informant were anonymous. The Supreme Court did say that *Adams* was a "stronger case than obtains in the case of an anonymous telephone tip."³³

²⁶ *Terry v. Ohio*, 392 U.S. 1, 19 (1968).

²⁷ Comment, *The Informant's Tip and Terry's "Reasonable Conclusion"—A Modified Standard*, 4 TEX. TECH L. REV. 167, 182 (1972).

²⁸ *Id.*; Comment, *The Informant's Tip as Probable Cause for Search or Arrest*, 54 CORNELL L. REV. 958 (1969).

²⁹ 407 U.S. 143 (1972).

³⁰ 407 U.S. at 147.

³¹ *Id.*

³² *Id.* at 146. See Comment, *The Informant's Tip and Terry's "Reasonable Conclusion"—A Modified Standard*, *supra* note 27, for a further discussion of the informant's reliability.

³³ 407 U.S. at 146.

In *Spinelli v. United States*,³⁴ the Supreme Court undertook to define the required level of reliability for self-verification of an anonymous tip. While in *Spinelli* the Supreme Court was concerned with probable cause to arrest and not reasonable suspicion to stop and frisk, certain aspects of that case are also applicable to a situation involving reasonable suspicion. For example, the Supreme Court stated in *Spinelli* that certain actions of the suspect suggested no criminal conduct and "were not endowed with an aura of suspicion by virtue of the informant's tip."³⁵ Rather, the Supreme Court felt that the facts given and verified in *Spinelli* were only "innocent-seeming activity and data."

"Innocent-seeming activity" was defined more clearly in *Terry*. The Supreme Court there simply stated that normal behavior was not an indication of criminal conduct.³⁶ In *Legato*, verification of the defendant's carrying an orange bag was only "normal conduct" as defined in *Terry*.

Furthermore, verification of "innocent-seeming data" can give rise to reasonable suspicion only if the verification is sufficiently detailed.³⁷ The only self-verification in *Legato* was that the defendants did arrive for the Delta flight at the approximate time given by

³⁴ 393 U.S. 410 (1968).

³⁵ *Id.* at 418. This language indicates that the information did not even reach the level of the reasonable suspicion standard.

³⁶ There is nothing unusual in two men standing together on a street corner, perhaps waiting for someone. Nor is there anything suspicious about people in such circumstances strolling up and down the street, singly or in pairs. Store windows, moreover, are made to be looked in. But the story is quite different there, as here, two men hover about a street corner for an extended period of time, at the end of which it becomes apparent that they are not waiting for anyone or anything; where these men pace alternately along an identical route, pausing to stare in the same store window roughly 24 times; where each completion of this route is followed by a conference between the two men on the corner; where they are joined in one of these conferences by a third man who leaves swiftly; and where the two men finally follow the third and rejoin him a couple of blocks away.

392 U.S. at 22.

³⁷ See *Spinelli v. United States*, 393 U.S. 410, 416 (1968), where the Supreme Court held:

In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.

the informant and that one of them did carry an orange bag. In comparing the self-verification in *Legato* to that which occurred in *United States v. Horton*,³⁸ the *Legato* self-verification seems only minimal. In *Horton*, the anonymous informant told the officials the name of the suspect, his race, his approximate age and weight, the color, year and model of the car driven by the suspect, and that the suspect was accompanied by another person.³⁹ While the question in *Horton* was probable cause to arrest, not reasonable suspicion to stop, the self-verification of the defendants' coincidental arrival at the airport at the approximate time named by the informant and the fact one of the defendants was carrying an orange bag is no more than minimal when compared to the degree of verification required in the "probable cause" cases.

Within the requirements established by the Fifth Circuit in airport cases, the self-verification of the informant's tip in *Legato* could have created constitutionally sufficient suspicion to stop Migdall in the airport boarding area.⁴⁰ However, the Fifth Circuit in *United States v. Skipwith*⁴¹ reaffirmed its position in *Moreno* and held that the determination of the reasonableness of a stop outside the embarkation point depends upon the particular facts of the case.⁴² The Fifth Circuit in *Moreno* did weigh the threat of hijacking when the suspect was outside the embarkation point.⁴³ In that case, however, the defendant had just purchased a ticket and was heading in the direction of the boarding area.⁴⁴ By contrast, in *Legato* Migdall had not purchased a ticket, was leaving the airport area, and was not attempting to board a plane. Despite the contrasting facts of *Moreno* and *Legato*, the Fifth Circuit in *Legato* considered the exigency of hijacking in assessing the reasonableness of the stop.⁴⁵ Contrary to the Fifth Circuit's conclusion in *Legato*,

³⁸ 488 F.2d 374 (5th Cir. 1973).

³⁹ *Id.*

⁴⁰ See *United States v. Skipwith*, 482 F.2d 1272 (5th Cir. 1973).

⁴¹ *Id.*

⁴² *Id.* at 1276.

⁴³ 475 F.2d 44 (1973).

⁴⁴ *Id.* at 46.

⁴⁵ 480 F.2d at 410-11. Also, the court in *Legato* expressed further concern for "the current threat to public safety posed by air piracy as well as the inherent destructive potential of a bomb. . . ." *United States v. Legato*, 480 F.2d 408, 411 (5th Cir. 1973).

two California federal courts have held that suspects not attempting to board a plane do not represent a threat of hijacking.⁴⁶ The reasoning of the California courts appears to be a more consistent reconciliation of the Fourth Amendment with the exigency of hijacking than the Fifth Circuit approach.⁴⁷

The threat of hijacking was also used to justify the custodial interrogation of Migdall after his initial stop. *Adams* requires that the stop be "a brief stop of a suspicious individual, in order to determine his identity or to maintain his status quo momentarily while obtaining more information. . . ." ⁴⁸ A further requirement for investigative stops is that the intrusion cannot be gauged by any mechanical test as to time and place.⁴⁹ Nevertheless, a lengthy custodial interrogative cannot be defined as a brief stop.⁵⁰ In *Legato*, Migdall was in police custody for a considerable time after he was stopped, and, in addition, was subjected to custodial interrogation. It would appear that the stop in *Legato* and the subsequent interrogation exceeded the requirement that it be brief and minimal.

The Fifth Circuit in *Legato* has attempted to ferret out a tragic and senseless crime. With this goal in mind, however, the circuit court has created several conflicts with existing laws in the area of fourth amendment rights. The court applied an erroneous test of

⁴⁶ *United States v. Anderson*, 13 Cr. Law Rep. 2395 (9th Cir. 1973); *United States v. Meulener*, 351 F. Supp. 1284 (C.D. Cal. 1972).

⁴⁷ See also Note, *Airport Searches and Seizures—Has The Fourth Amendment Become Excess Baggage For The Travellers?*, 14 SANTA CLARA L. REV. 169, 174 (1973).

Justice Goldberg, in his concurring opinion in *Legato* noted:

It is passing strange that most of these airport searches find narcotics and not bombs, which might cause us to pause in our rush toward malleating the Fourth Amendment in order to keep the bombs from exploding. Seeking to prevent or detect crime, standing alone, has never justified eroding the right to privacy, and I continue to hope that we will soon return to the hallowed and halcyon days of the Fourth Amendment.

480 F.2d 408, 414 (5th Cir. 1973). Justice Goldberg should continue to worry about the deterioration of the fourth amendment in view of the Fifth Circuit decision in *United States v. Skipwith*, 482 F.2d 1272 (5th Cir. 1973).

⁴⁸ 407 U.S. 143, 146 (1972).

⁴⁹ *United States v. Moreno*, 475 F.2d 44, 51 (5th Cir. 1973).

⁵⁰ If extensive questioning is to be allowed, could not the officials in *Spinelli v. United States*, 393 U.S. 410 (1969), have used such methods? By doing so, they could apply several police techniques of investigation in an attempt to secure enough information to allow a search and seizure based on probable cause. Such result would lead to the circumventing of any need for a requisite level of suspicion.