

REPRESENTING JOHN W. TERRY

HONORABLE LOUIS STOKES*

Thank you very much Professor Barrett, Dean Hasl, and all of our distinguished panelists.

Let me take just a moment to say what a pleasure it is to have been invited to participate in this 30th anniversary of *Terry v. Ohio*.¹ I am also very pleased to be here with Reuben Payne, who was the winning prosecutor in the case. Reuben and I happened to go to law school at the same time. After practicing a little while, he went into the County Prosecutor's office and I went into private practice and, of course, we tried a lot of cases against one another during that period of time. We've always maintained a very special friendship, not only during that time, but over the years, and it has been a pleasure just to get back and see him after so many years that we've not seen one another.

It is difficult to believe that it was thirty years ago that *Terry* was decided. Time has gone by very rapidly. Actually, it is more like 35 years, because the actual date of arrest of Terry and Chilton was October 31, 1963. Reuben and I did not try this case until September 22, 1964. Additionally it was not until June 10, 1968, when this case was decided. A great deal of time went by, closer to 35 years than 30 years.

Professor Barrett just mentioned my representation of John Terry. Because we are supposed to give you some background on Terry, I thought I'd share with you the fact that I knew Terry before he got into this particular difficulty. Terry was sort of a "hanger on." He was more of a petty criminal than anything else. Also, he was addicted to drugs.

I knew Terry from his hanging around with another person whom I represented, a fellow by the name of Billy Cox. Billy Cox was a rather notorious individual around Cleveland. I repre-

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¹ 392 U.S. 1 (1968).

sented Billy Cox in a couple of murder cases and knew Terry from his hanging around Billy Cox, because Terry liked to be around the more notorious type of individuals in the community. After his arrest, Terry called me. I went down to see him, and he asked me if I would represent both him and Chilton. Both of them were able at that time to retain me. Later on, it was determined they were both really indigent. Not only could they not afford me, they could not afford to take this case up to the United States Supreme Court.

Once it was apparent that we had a case that was destined to go all the way, I realized the importance of it. I decided that if it meant that I would have to pay the expenses of getting this case up to the United States Supreme Court, I would do that.

While I was in the process of appealing it up to the Supreme Court, we had another lawyer in Cleveland, a very distinguished criminal trial lawyer and constitutional expert, Jack G. Day, who is now Judge Jack G. Day.² When Jack learned that I was taking this case up, he was also interested in the constitutional aspects of it and he volunteered both to share the cost of taking it up with me, and, also to assist me with the brief work. I was very pleased to have Jack with me because, as I said, he was a very distinguished constitutional lawyer.

When I first went down and talked with Chilton and Terry and learned the facts of the case, it appeared to me that I had two choices. Both of them had been caught with guns. Obviously there was not much defense. The police officer had come over, approached them, found guns on two of the three men, and charged them. My first inclination was to think about pleading them and then seeing what was the best deal that I could get for them. Chilton had no record. Chilton had never been arrested before, had no convictions, and he was therefore clean. Terry did have some prior convictions, though nothing really major, but he had a couple of convictions and several arrests.

Terry's prior record was one of the reasons that, after I decided from the fact situation that this really fell within the confines of the *Mapp*³ case and I really ought to be able to file a mo-

² Judge Day, who served on the bench in Ohio's Eighth Appellate District from 1968-1984 and was Chief Justice of the Ohio Court of Appeals during 1982, is now retired from the bench and Of Counsel to the Kaufman & Cumberland law firm in Cleveland, Ohio.

³ *Mapp v. Ohio*, 367 U.S. 643 (1961).

tion to suppress here, I thought it would be novel to try this suppression argument in a gun case. The more I talked with Terry and Chilton, and the more I analyzed the facts of the situation, with the realization that the *Mapp* case exclusionary rule did not disclaim applicability to guns, the more I felt this would be the appropriate way to approach it.

The other reason I did so was because the case was being tried in front of Judge Bernie Friedman. Judge Friedman was very liberal, a civil libertarian type of judge. He also was a very courageous type of judge. If he agreed with you that the law was on your side, whether you were against the police or anyone else, he would have the guts to throw that case out and do whatever was right by your client. So I didn't hesitate to try a case before Judge Bernie Friedman. He was a well-respected, highly regarded judge. I tried several other matters before him where I had these types of facts, and he had always come right down the line. So I knew that if I had any chance at all, my best chance was with Judge Bernie Friedman.

I think I need to take a couple of minutes to talk about Detective McFadden. He was a real character—a tall, stately guy, and basically a good policeman. "Mac," as we called him, was really a guy that we really liked. He was straight. One thing about him—as a police officer, he came straight down the line. You did not have to worry about him misrepresenting what the facts were. He would come straight down the line, and as a defense lawyer I could appreciate that.

When I put him on as my witness on the motion to suppress, I, of course, did not know what he would say. All I could rely upon was what my clients had told me. I could not believe his testimony as it came out of his mouth on the stand. He said to us that he had seen these two fellows standing across the street from him, and he described them as being two Negroes, and then he talked of the white fellow who came up to them and talked with them. Then he went on down the street. Mac then admitted to us they weren't doing anything, except one of the black fellows would leave the other one, walk down the street a little bit, turn around, peer into the window at either the United Airlines or the jewelry store window, then walk back up to where the other fellow was. Then the other fellow would take a walk in a similar manner.

He was asked specifically what attracted him to them. On

one occasion he said, "Well, to tell the truth, I just didn't like 'em." He was asked how long he'd been a police officer. "39 years." How long had he been a detective? "35 years." What did he think they were doing? "Well," he said, "I suspected that they were casing a joint for the purpose of robbing it." "Well," he was asked, "have you ever in your 39 years as a police officer, 35 as a detective, had the opportunity to observe anybody casing a place for a stickup?" He said, "No, I haven't." "Have you ever arrested anybody for that purpose?" "No, I haven't." "Then what attracted you to them?" He indicated he just didn't like them. He suspected they might be up to a stickup. That also is the reason why he thought they might have guns.

At any rate, the fact situation was that he then followed them down the street. After he saw this white fellow, Katz, come up, talk with them and then go down the street on Euclid Avenue, he then saw the two of them make one more trip up and down Huron Road.

And then the two of them walked. We asked, "Did they run down the street? Did they act suspicious or anything?" "No, they walked at a normal gait." "What did you do?" "I followed behind them."

When they got in front of Zucker's store, the three of them—two black males and a white male—were just standing there doing nothing. He said, "I went over to them and identified myself as a police officer. I said, 'What are your names?' " In one place in the record he says, "They mumbled something." At another place in the record, he says, "They gave it to me quick."

Then he was asked, "What did you do at that point?" He said, "I grabbed Terry, spun him around," and then, when he couldn't get the gun out of the top coat, he then took the whole top coat off of him. Then he took the gun out of Terry's pocket. That's when he ordered the three of them into the store. As he walked into the store, he said that he told the store personnel, "Call the wagon."⁴ He testified that that meant they were under arrest.⁵

There were a couple of things that seemed odd to me. One was that he was operating strictly upon his own suspicion. These men were not in the process of committing a crime. They

⁴ *State v. Terry*, 214 N.E.2d 114, 116 (Ohio Ct. App. 1966).

⁵ *See id.* at 119.

had done nothing but walk up and down the street. My position was that when you go over to three men on the street, and you start asking them questions and, when they don't answer, you turn them around and start exercising dominion over them, at that point you have in fact put those persons under arrest.

The case went on from there and, of course, the rest is history. I think that the judges and scholars that are here today will discuss those aspects of it with you.

I'm in the kind of position right now that I was in before the Court. When I started my argument that day I lost track of the little lights on the lectern. You're supposed to reserve five minutes of time. I was less than five minutes into my argument when Justice Potter Stewart started his first questions of me. From that point they bombarded me with questions. So I forgot about those little lights. When I looked down and saw this red light, I said, "I would like to reserve five minutes of my time." When I sat down, the sexton of the Court came over to me, leaned down and said, "Mr. Stokes, you don't have any more time." So anyway, I am out of time.