



## ELEVENTH CIRCUIT DISCUSSES FRISK OF CAR PASSENGER

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On October 31, 2022, the Eleventh Circuit Court of Appeals decided *the United States v. James*<sup>i</sup>, which is an excellent review of the law related to frisks of passengers in a vehicle. The relevant facts of *James* are as follows:

Officer Blake Russell, formerly of the Mobile, Alabama Police Department, testified that from 2018 to 2021, he was assigned to a "hot-spot area" in Mobile. On the night of August 14, 2020, Officer Russell pulled over a black Ford Escape for a traffic violation in one of his assigned hot-spot areas. Officer Russell wore a body camera that recorded the events of the stop and the footage from the camera was shown at the hearing. The footage shows the following events.

After pulling over the black Ford Escape, Officer Russell, along with Officer Jorge Chiang, approached the vehicle. There were three people inside the car—a female driver, a female passenger in the front passenger seat, and James in the rear seat of the car. After requesting a license and proof of car insurance from the driver, Officer Russell asked the occupants if there were any weapons in the vehicle. The driver, handing over several documents, responded that there were no weapons in the vehicle. The video shows James speaking with Officer Chiang during the initial moments of the stop, showing his hands to Officer Chiang, moving them to his lap, and reaching toward his pockets. Officer Russell again asked whether there were any weapons in the vehicle and James responded that he had turned over his pocketknife to Officer Chiang. James provided his identifying information to Officer Russell.

Officer Russell then asked each occupant individually if they had any weapons or narcotics in the vehicle. The driver admitted that she had an open container in the vehicle. James responded for a second time that he had given his pocketknife to Officer Chiang: "I just gave him my knife, but what I'm trying to see is, y'all got probable cause to search? I don't care. I don't care. Is y'all got probable cause."

The officers asked each occupant to exit the car and sit on the front bumper of the patrol vehicle. When James exited the car, Officer Russell informed James that he would pat him down. While James turned to put his hands on the car, he informed Officer Russell that he received a ride from the female occupants to "take this back, somebody left it in my car." Officer Russell handcuffed James, proceeded with the pat-down, and located a

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pistol in James's right pant leg. Officer Russell asked James if he had a permit for the gun and James responded that he did not. James informed Officer Russell that the pistol was not his and reiterated repeatedly that he was "taking it back." Officer Russell placed James in the back seat of his patrol vehicle.

Several minutes later, Officer Russell read James his [Miranda](#) rights and questioned him about the firearm. James told Officer Russell that the firearm belonged to his cousin, James did not have a pistol permit and he had a prior felony conviction.

At the evidentiary hearing, Officer Russell stated that upon approaching the vehicle, he immediately smelled marijuana, he observed open containers in the front seat, and he noticed the slurred speech and nervous behavior of the occupants. He testified that the occupants were speaking over each other, which he considered might have been an attempt to distract the officers.

As for James's behavior, Officer Russell testified that when he asked James whether he had any weapons or narcotics, James "hesitated" and questioned whether Officer Russell had probable cause to search. Officer Russell testified that as a result of his training and experience, he interpreted this as a sign that James was deceptive or hiding something.

Officer Russell explained that he asked James and the two females to step out of the vehicle "[f]or officer safety" due to the nervousness of the occupants and because the officers were outnumbered. He decided to pat down James because James displayed signs of nervousness and deception and James's baggy clothes made it impossible for Officer Russell to tell if James was carrying a weapon. When Officer Russell began the pat down, James started apologizing and repeatedly stated that he was trying to "take it back," which Officer Russell took to mean that James was attempting to admit that he was carrying a weapon. Officer Russell stated that James cooperated with the officers in providing accurate personal information and showing his hands when the officers approached the vehicle. No marijuana was found in the car or on any of the occupants.<sup>ii</sup>

James filed a motion to suppress the gun found during the frisk and argued the officers lacked reasonable suspicion to believe he was armed and dangerous. The district court denied the motion, and James pleaded guilty with the right to appeal the denial of the motion to suppress. James filed a timely appeal with the Eleventh Circuit Court of Appeals.

The issue on appeal was whether the officers had reasonable suspicion that James was armed and dangerous so as to make the frisk reasonable under the Fourth Amendment.

The court of appeals first discussed the relevant legal principles related to the issue at hand. The court stated

**In interpreting the [Fourth Amendment's](#) protection against unreasonable searches and seizures, the Supreme Court has held that an officer may frisk a legally stopped individual for weapons if he reasonably believes that the individual is armed and dangerous. [Terry v. Ohio, 392 U.S. 1, 27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 \(1968\)](#). "The**

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officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.* Similarly, an officer may conduct a pat-down search of a person seized during a lawful traffic stop, if the officer has a reasonable suspicion that the individual is armed and dangerous. [Arizona v. Johnson, 555 U.S. 323, 327, 129 S. Ct. 781, 172 L. Ed. 2d 694 \(2009\)](#). We evaluate the totality of the circumstances to determine whether the officer's suspicion was reasonable. [United States v. Johnson, 921 F.3d 991, 998 \(11th Cir. 2019\)](#) (*en banc*). Circumstances considered include "the number of officers" at the scene, and a person's nervous, argumentative, or evasive behavior. *Id.*; [United States v. Bishop, 940 F.3d 1242, 1248-49 \(11th Cir. 2019\)](#). The reasonable suspicion inquiry "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person." [United States v. Arvizu, 534 U.S. 266, 273, 122 S. Ct. 744, 151 L. Ed. 2d 740 \(2002\)](#) (quotations omitted). Still, an officer's suspicion, based on inferences drawn in light of his experience, must rise beyond an "inchoate and unparticularized suspicion or hunch." [Terry, 392 U.S. at 27](#) (quotations omitted).<sup>iii</sup>

In summary, to lawfully frisk a person, the officer must have a reasonable belief that the person is armed and dangerous. This reasonable belief may be based on the specific facts of the case, the totality of the circumstances, and the officer's training and experience. However, the reasonable belief must be more than a hunch or suspicion that is not based on specific facts of the case.

The court of appeals then examined the factual findings of the district court. During an appeal, the court of appeals cannot overturn the district court's factual findings unless the district court's findings are determined to be "clearly erroneous."

In James's case, the district court found the following relevant facts: (1) James and the other occupants had slurred speech; (2) he was wearing baggy clothing; (3) he did not answer some of the officer's questions; (4) he answered some questions evasively and asked if the officers had probable cause; (5) he already relinquished one weapon, a knife, to officers; (6) Officer Russell smelled marijuana coming from the vehicle and (7) the officers were outnumbered. The court of appeals held that none of these findings were clearly erroneous and, as such, would not be overturned.

James argued that these facts were insufficient to establish reasonable suspicion that he may be armed and dangerous. The court of appeals disagreed with James, noting that it was late at night and the facts above, in the totality of the circumstances, "gave Officer Russell reason to believe that he was dealing with an armed and dangerous individual and that the officers' safety may be in danger,"<sup>iv</sup> and therefore frisk of James was reasonable under the Fourth Amendment.

Therefore, the court of appeals affirmed the denial of the motion to suppress.

**Note:** Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.

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<sup>i</sup> No. 21-13689 (11<sup>th</sup> Cir. Decided October 31, 2022 Non-Argument)

<sup>ii</sup> Id. at 3-6

<sup>iii</sup> Id. at 11-12 (emphasis added)

<sup>iv</sup> Id. at 14

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