

**A BRIGHT LINE THROUGH UNREASONABLE
SEIZURE IN THE LAND OF *TERRY V. OHIO*:
*NORTHRUP V. CITY OF TOLEDO POLICE
DEPARTMENT***

On September 30, 2014, the United States District Court for the Northern District of Ohio addressed the summary-judgment motion of the City of Toledo and of three individual officers in a civil-rights suit brought by a citizen, Shawn Northrup.¹ The motion was granted in part and denied in part.² A three-judge panel of the United States Court of Appeals for the Sixth Circuit, acting unanimously, has now affirmed that order in part and reversed it in part.³ Specifically, the Court of Appeals found that the lower court had improperly denied summary judgment for one individual defendant.⁴ But the real story in this case is the appellate court's refusal to recognize open carry of a holstered firearm as *per se* grounds for even a brief police detention and investigation in a state where such carry is legal.

The suit arose from an encounter between Northrup and Toledo police officers on June 16, 2010.⁵ Northrup was walking through his neighborhood while openly carrying a holstered handgun on his hip.⁶ A passing motorcyclist stopped to confront him, but Northrup correctly informed the concerned motorcyclist that he was within his rights according to Ohio law.⁷ After words were exchanged, the motorcyclist left the area and called 911.⁸ Toledo police officers David Bright and Donald Comes were dispatched to the scene.⁹ After Northrup and Bright argued about whether Northrup was required to cooperate with Bright's investigation, Bright handcuffed Northrup

1. Northrup v. City of Toledo Police Div., 58 F. Supp. 3d 842 (N.D. Ohio 2014).

2. *Id.* at 854.

3. Northrup v. City of Toledo Police Dep't, 785 F.3d 1128 (6th Cir. 2015). The case was filed and reported in the lower court with "City of Toledo Police Division" as the lead defendant but was later amended to reflect the City of Toledo itself as the lead defendant. *See infra* note 27 and accompanying text.

4. *Northrup*, 785 F.3d at 1134.

5. *Northrup*, 58 F. Supp. 3d at 845.

6. *Northrup*, 785 F.3d at 1130.

7. *Id.*

8. *Id.*

9. *Id.*

and placed him in the back of a police cruiser.¹⁰ Officer Comes was present, and he spoke with the motorcyclist on the telephone to try to get a clearer picture of the events that led the motorcyclist to call 911,¹¹ but Comes was not directly involved with the arrest of Northrup.¹²

After Northrup had been handcuffed and placed in the cruiser, Sergeant Daniel Ray arrived.¹³ Ray called the Toledo Police Department's (TPD) detective bureau to consult on a potential charge.¹⁴ After this consultation, Northrup was released with a citation for "failure to disclose personal information"¹⁵—a charge that was later dropped.¹⁶

Northrup's federal civil-rights suit named several defendants, including the TPD, Sergeant Ray, and Officer Bright.¹⁷ He brought his civil-rights claims under 42 U.S.C. §§ 1983, 1985 and 1988.¹⁸ Northrup claimed that the individual officers, as well as the TPD itself, violated his federally protected rights under various constitutional provisions:

- His First Amendment right to the "symbolic speech" of open carry,
- His Second Amendment right to bear arms, and
- His Fourth Amendment protections against unreasonable search and seizure (including excessive force).¹⁹

Northrup also brought state tort claims for assault and battery, false arrest, and malicious prosecution, along with Ohio constitutional claims, under the federal court's supplemental

10. *Id.*

11. *Northrup v. City of Toledo Police Div.*, 58 F. Supp. 3d 842, 847 (N.D. Ohio 2014).

12. *Northrup*, 785 F.3d at 1130.

13. *Id.*

14. *Id.*

15. *Id.* See OHIO REV. CODE ANN. § 2921.29(A)(1) (Westlaw 2015).

16. *Northrup*, 785 F.3d at 1130.

17. *Id.* at 1130–31.

18. 42 U.S.C.A. §§ 1983, 1985, 1988 (Westlaw 2015). Section 1983 provides a cause of action in federal court for victims of civil-rights violations "under color of [law]," section 1985 covers conspiracies regarding same, and section 1988 provides that victorious plaintiffs may recover their attorney's fees in addition to damages.

19. *Northrup*, 785 F.3d at 1130–31.

jurisdiction.²⁰ Finally, Northrup alleged that the TPD was liable under the *Monell* doctrine²¹ because the officers' unlawful actions were committed pursuant to "interrelated *de facto* policies, procedures, practices and/or customs . . . by the City of Toledo . . . in permitting its officers to file false charges, sham legal processes, and pre textual (sic) criminal stops without reasonable suspicion or probable cause."²² Additionally, Northrup's complaint contained a demand for punitive damages, alleging malice on the part of all defendants.²³

The defendants filed a motion for summary judgment on all claims. The district court issued an order on September 30, 2014, granting that motion in part and denying it in part. Judge Helmick found that the defendants were entitled to summary judgment on some allegations based on the statutory immunity of the TPD and based on qualified immunity for the officers. The court noted that the TPD could not be sued as an entity because it is not a political subdivision of the state.²⁴ Even if the complaint were construed as being against the City of Toledo, Ohio law grants cities broad immunity from lawsuits.²⁵ Both federal and Ohio law immunize political subdivisions of states against punitive damage claims.²⁶ Therefore, Judge Helmick granted summary judgment in favor of the TPD on all state-law claims and on the punitive-damages claim. After the district court ruling, Northrup amended his complaint to name the city rather than the police department as the defendant.²⁷ The court also found that Officer Comes was not significantly

20. Northrup v. City of Toledo Police Div., 58 F. Supp. 3d 842, 853 (N.D. Ohio 2014).

21. See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978) (holding that a local government is immune from §1983 claims simply on the basis of its employees' or agents' actions but holding that this immunity is not absolute; violations of rights that occur pursuant to the local government's "policy or custom" are not immune).

22. Brief for Plaintiff in Opposition to Defendants' Motion for Summary Judgment at 34, Northrup v. City of Toledo Police Div., 58 F. Supp. 3d 842 (N.D. Ohio 2014) (No. 3:12-CV-01544) (citations omitted).

23. *Northrup*, 58 F. Supp. 3d at 854.

24. *Id.* at 853.

25. *Id.*

26. *Id.* at 854.

27. Motion for Leave to Amend Complaint by Interlineation, Northrup v. City of Toledo Police Div., 58 F. Supp. 3d 842 (N.D. Ohio 2014) (No. 3:12-CV-01544).

involved in the incident.²⁸ Therefore, the court granted summary judgment to Officer Comes on all claims as a matter of law.²⁹

As for the other individual defendants, they were peace officers and were therefore entitled to qualified immunity. Under the doctrine of qualified immunity, state actors will not be held liable for discretionary acts that violate a citizen's constitutional rights unless the right in question is one "so clearly established that a reasonable officer would understand that his or her actions would violate that right."³⁰ The district court found that the facts of this case did not support such a finding on Northrup's First and Second Amendment claims, and granted summary judgment to all defendants on those claims.³¹

The district court, however, permitted Northrup's Fourth Amendment, state law, and punitive-damage claims against Officer Bright and Sergeant Ray to go forward. Those defendants filed an interlocutory appeal³² to the United States Court of Appeals for the Sixth Circuit requesting summary judgment on the remaining claims.

The defendants' appeal was considered by a three-judge panel of the Sixth Circuit. Writing for the unanimous panel, Judge Sutton³³ found that Sergeant Ray was entitled to qualified immunity because he acted in good faith.³⁴ Sixth Circuit precedent holds that even if an officer's conduct is illegal, qualified immunity is warranted when the officer relies in good faith on another officer's report.³⁵ Sergeant Ray could be held liable in these circumstances only if Officer Bright had directly confessed to him that Bright had illegally seized Northrup.³⁶ Because there was no evidence in the record of such a confession, Ray was entitled to qualified immunity, and the appellate panel ordered that summary judgment be entered in Ray's favor on all claims.³⁷ The remainder of the district court's order, however, was

28. *Northrup*, 58 F. Supp. 3d at 847.

29. *Id.*

30. *Id.* (citing *Thomas v. Cohen*, 304 F.3d 563, 569 (6th Cir. 2002)).

31. *Id.* at 854.

32. The district court entered its order as final on September 30, 2014. Because that order was final, it became appealable on an interlocutory basis. *See* FED. R. CIV. P. 54(b).

33. Judge Sutton was joined by Judges Gilman and Rogers.

34. *Northrup v. City of Toledo Police Dep't*, 785 F.3d 1128, 1134 (6th Cir. 2015).

35. *Id.* (citing *Humphrey v. Mabry*, 482 F.3d 840, 847 (6th Cir. 2007)).

36. *Id.*

37. *Id.*

affirmed, and all remaining claims against Officer Bright were allowed to go forward.

The Fourth Amendment protects people from unreasonable search and seizure.³⁸ It is well-settled law that any intrusion into a person's privacy constitutes a "search" and any restriction on his or her liberty, however brief or temporary, constitutes a "seizure" of that person for purposes of Fourth Amendment analysis.³⁹ The Supreme Court of the United States struck a balance between Fourth Amendment rights and officers' responsibilities to conduct reasonable investigations of suspected criminal activity while ensuring their own safety in *Terry v. Ohio*. This allowable police conduct is commonly known as a *Terry* stop.

The *Terry* stop was first articulated in 1968 by Chief Justice Earl Warren, writing for eight justices.⁴⁰ *Terry* acknowledges that while a "stop and frisk" is a seizure and search for Fourth Amendment purposes, the "stop and frisk" can be a *reasonable* seizure or search when the circumstances justify the intrusion into a person's liberty: "[I]n 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."⁴¹ In the context of the *Terry* case itself, the officer reasonably suspected criminal activity and had enough "specific and articulable facts" to believe the person he stopped might be armed,

38. U.S. CONST. amend. IV ("The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . .").

39. Chief Justice Earl Warren wrote:

[T]he central inquiry under the Fourth Amendment [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security. "Search" and "seizure" are not talismans. We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a "technical arrest" or a "full-blown search."

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

40. *See id.* Justice William O. Douglas alone dissented, wanting to go much farther than his brethren: he reasoned that the Fourth Amendment requires *probable cause* to suspect criminal activity for an officer to stop a person on the street, even for brief questioning or a "pat-down" search. *Id.* at 35–39 (Douglas, J., dissenting).

41. *Id.* at 21 (majority opinion).

thereby justifying a “frisk” or “pat-down” to check for weapons that might pose a threat to the officer’s safety.⁴²

Terry offers a bright-line rule that can be used to determine when police conduct violates a clearly established constitutional right, which would allow a plaintiff to defeat a police claim of qualified immunity.⁴³ Thus, if Officer Bright exceeded the limits of his authority to seize Northrup, Bright’s claim of qualified immunity must fail. Like the district court, the appellate panel took notice of the difficult position in which officers find themselves when responding to situations cold.⁴⁴ The court applied the rule from *Terry v. Ohio* as generously as it could yet still found that Bright was not entitled to qualified immunity. The Sixth Circuit panel in *Northrup* applied the *Terry* test to Bright’s actions and found his conduct short of the standard:

Officer Bright relied on two “specific and articulable facts”: Northrup’s open possession of a firearm and the 911 call about what Northrup was doing. The Fourth Amendment no doubt permitted Bright to approach Northrup and to ask him questions. But that is not what he did. He relied on these facts to stop Northrup, disarm him, and handcuff him. Ohio law permits the open carry of firearms, and thus permitted Northrup to do exactly what he was doing. While the dispatcher and motorcyclist may not have known the details of Ohio’s open-carry firearm law, the police officer had no basis for such uncertainty. If it is appropriate to presume that citizens know the parameters of the criminal laws, it is surely appropriate to expect the same of law enforcement officers—at least with regard to unambiguous statutes.

Clearly established law required Bright to point to evidence that Northrup may have been “armed and dangerous.” Yet all he ever saw was that Northrup was armed—and legally so. To allow stops in this setting “would effectively eliminate Fourth

42. *Id.*

43. *Northrup v. City of Toledo Police Dep’t*, 785 F.3d 1128, 1131 (6th Cir. 2015).

44. *See id.* at 1133.

Amendment protections for lawfully armed persons.”⁴⁵

The City of Toledo’s attorneys, who were also defending the individual officers, sought “specific and articulable facts” that might justify Officer Bright’s actions. They framed their argument in terms that would, if accepted by the courts, effectively render legal open carry *per se* grounds for detention and questioning. The defendants argued that the officer “knew that the sight of a man with a gun . . . generated sufficient concern to cause someone to place an emergency call.”⁴⁶ The defendants also cited the dramatic rise in mass shootings in America and argued that “Officer Bright and Sergeant Ray and were faced with a choice: respond to the communities’ fear and the appearance of the gunman by performing an investigatory stop, or do nothing while Northrup continued walking down Rochelle and hope that he was not about to start shooting.”⁴⁷

The appellate panel was having none of it:

Law enforcement, to be sure, is not an easy job, and it often puts officers to difficult choices. But this was not one of them. The argument indeed presents a false dichotomy. Nothing in the Fourth Amendment prohibited Officer Bright from responding to the call and ascertaining through a consensual encounter whether Northrup appeared dangerous. Until any such suspicion emerged, however, Bright’s *hope* that Northrup “was not about to start shooting” remains another word for the *trust* that Ohioans have placed in their State’s approach to gun licensure and gun possession.

....

While open-carry laws may put police officers . . . in awkward situations from time to time, the Ohio legislature has decided its citizens may be entrusted with firearms on public streets. The Toledo Police Department has no authority to disregard this decision—not to mention the protections of the Fourth Amendment—by detaining every “gunman” who

45. *Id.* at 1131–32 (citations omitted).

46. Brief of Defendant-Appellants at 16, *Northrup v. City of Toledo Police Dep’t*, 785 F.3d 1128 (6th Cir. 2015) (No. 14-4050).

47. *Id.* at 17.

lawfully possesses a firearm. And it has long been clearly established that an officer needs evidence of criminality or dangerousness before he may detain and disarm a law-abiding citizen. We thus affirm the district court's conclusion that, after reading the factual inferences in the record in Northrup's favor, Officer Bright could not reasonably suspect that Northrup needed to be disarmed.⁴⁸

It is difficult to imagine an appellate court making a more forceful assertion regarding the Fourth Amendment's protection of lawful conduct—despite the fact that a few citizens or police officers might find that lawful conduct irritating or even disturbing. Northrup was not a *gunman*. He was a citizen exercising his lawful right to carry a firearm openly. A police officer's annoyance with this state of affairs does not grant that officer license to impose groundless detentions or to issue frivolous citations for other crimes for which there is little or no evidence.

Neither the district court nor the appellate panel addressed the two crimes that Northrup was suspected of committing in much detail: Bright says that he originally arrested Northrup on suspicion of “inducing panic,” an Ohio misdemeanor.⁴⁹ No facts on the record could yield an interpretation that Bright reasonably perceived that Northrup was causing “the evacuation of any public place, or otherwise caus[ing] serious public inconvenience or alarm” by falsely reporting an emergency, threatening violence, or other criminal activity.⁵⁰ No public place was evacuated, and a single citizen's call to 911—by an individual who withdrew his complaint when he was told by the dispatcher that open carry is legal in Ohio—can hardly be considered “serious public inconvenience or alarm.” Even Officer Bright and Sergeant Ray realized this shortly after the arrest when they consulted with a detective who advised them to issue Northrup a citation for “failure to disclose personal information.”⁵¹ The basis for this charge—dismissed later by the city's prosecutors—was that Northrup had initially refused to hand over his driver's license, though he did so before being handcuffed.

48. *Northrup*, 785 F.3d at 1133 (citations omitted).

49. Deposition of Officer David Bright at 61, *Northrup v. City of Toledo Police Div.*, 58 F. Supp. 3d 842 (N.D. Ohio 2014) (No. 3:12-CV-01544).

50. See OHIO REV. CODE ANN. § 2917.31(A) (Westlaw 2015).

51. See Deposition of Officer David Bright, *supra* note 49, at 90–91.

Again, both the district and appellate courts found enough room in the facts to allow Northrup's false-arrest claim to go forward on this point. The relevant part of the "failure to disclose" statute defines the offense as "refus[al] to disclose the person's name, address, or date of birth, when requested by a law enforcement officer who reasonably suspects . . . [t]he person is committing, has committed, or is about to commit a criminal offense."⁵² Bright's police report says he approached and questioned Northrup to investigate the possibility that he might be "violating the Weapons Under Disability Act."⁵³ Thus Bright felt that he needed to ascertain whether the person he saw openly carrying a holstered pistol might be a felon barred from possessing such a firearm or might be under the influence of drugs or alcohol.⁵⁴ Yet the defense never adduced any "specific and articulable facts"⁵⁵ to support the officer's suspicion of Northrup's potential felon status or intoxication. The court's ruling makes it plain that unfounded speculation about the intentions of a person openly carrying a firearm can never justify an officer's escalating a simple approach into a detention or arrest.

J.D. BALDWIN

CONTRIBUTIONS MADE BY PROFESSOR CHRISTOPHER HASTINGS

52. OHIO REV. CODE ANN. § 2921.29 (Westlaw 2015).

53. Plaintiff's Exhibit B – Police Report at 2, Northrup v. City of Toledo Police Div., 58 F. Supp. 3d 842 (N.D. Ohio 2014) (No. 3:12-CV-01544), ECF No. 38-2.

54. OHIO REV. CODE ANN. § 2923.13(A) (Westlaw 2015) (“[N]o person shall knowingly . . . carry, or use any firearm [if] convicted of any felony offense . . . [or] drug dependent [or] alcoholic.”).

55. See *Terry v. Ohio*, 392 U.S. 1 *passim* (1968).